Part 2 Contract Law CHAPTER 14 Discharge and Remedies Page 307 CASE OPENER Impossible Wine Bottles The Anchor Glass Container Corporation and its parent company, Consumers Packaging, Inc. (CPI), entered into a series of agreements with Encore Glass, Inc., to supply glass containers of a specific type and quality for the wine industry. On June 24, 1999, Encore entered into an amended agreement with Anchor and CPI. In the amended agreement, the parties agreed that the products would be manufactured at CPI's Lavington plant. Additionally, the amended agreement gave Encore a generous rebate schedule ranging from 1 to 2.5 percent and a new discount schedule. In May 2001, CPI filed for bankruptcy. As a result of the bankruptcy proceedings, the Lavington plant was sold in August 2001. The new owners of the Lavington plant did not assume CPI's obligations under the amended agreement. The Lavington plant could no longer be used to supply the glass containers to Encore. As a result of the sale, Anchor notified Encore on October 12, 2001, that it considered itself relieved of its obligations under the agreement due to its impossibility to perform. Encore took its business to another company, which did not offer the same rebates and discounts as had Anchor. When Anchor filed for bankruptcy in 2002, Encore filed a claim to recover the $6,102,912.60 it lost when Anchor stopped providing it with rebates and discounts under the contract. The bankruptcy court ruled against Encore, finding that it was impossible for Anchor to perform after the Lavington plant was sold. Encore appealed. Should Anchor be required to honor the contract despite the loss of the Lavington plant? Why or why not? What ethical system, if any, would permit Encore to recover the lost rebates and discounts? LEARNING OBJECTIVES LO 14-1 Identify the primary methods of discharging a contract. LO 14-2 Recognize the primary legal remedies available for a breach of contract. LO 14-3 Recall the primary equitable remedies available for a breach of contract.

Methods of Discharging a Contract LO 14-1 Identify the primary methods of discharging a contract. The previous five chapters focus primarily on how parties enter into a legally binding agreement. Once a party has entered into a binding agreement, how does the party terminate his or her obligation under the contract? That question is the focus of this chapter. When a party's obligations under a contract are terminated, they are said to be discharged. There are a number of ways by which a party's contractual obligations can be terminated, or discharged. The first, and the one most parties hope to secure from the other when they enter into an agreement, is performance. The others are the occurrence of a condition or its failure to occur, material

breach by one or both parties, agreement of the parties, or operation of law. The chapter explains each of these methods. Conditions Under ordinary circumstances, a party’s duty to perform the promise agreed to in a contract is absolute. Sometimes, however, a party’s duty to perform may be affected by whether a certain condition occurs. Contracts containing conditions affecting the performance obligations of the parties are called conditional contracts. The conditions may be either implied by law or expressly inserted into the contract by the parties. Discharge by Conditions Precedent, Subsequent, and Concurrent There are three types of conditions: condition precedent, condition subsequent, and concurrent conditions, which are summarized in Exhibit 14-1. A condition precedent is a particular event that must occur for a party’s duty to arise. If the event does not occur, the party’s duty to perform does not arise. Frequently, real estate contracts are conditioned on an event such as the buyer’s ability to sell his current home by a certain date. If the home does not sell, the condition does not arise, and the parties have no duty to perform and are thus discharged from the contract. Exhibit 14-1Types of Conditions Condition Precedent An event that must occur or an action that must be taken before a party’s duty arises. A life insurance company is only required to pay out the beneficiaries of a life insurance plan after the contract-holder has died. Condition Subsequent A future event that terminates a party’s duty when it arises. Non-compete clauses (NCC) between employers and their current or former employees often have expiration dates. Concurrent Conditions When each party’s duty is conditioned upon the performance of the other, meaning each party’s duty must be performed simultaneously. A buyer’s duty to pay for a good is conditioned upon a seller’s duty to deliver that good, and vice versa. Another common example of a contract containing a condition precedent is an insurance contract. If Bill purchases a life insurance contract, he is obligated to pay the monthly premiums specified in the contract, but the insurance company’s obligation to perform arises only when he dies. Bill’s death is the condition that triggers the company’s duty to pay his beneficiary. The key to this concept is that the condition must occur before a duty to perform arises. A condition subsequent is a future event that terminates the obligations of the parties when it occurs. For example, John may enter into an agreement to lease an apartment for five years, conditioned on him not being called to active duty in the National Guard. If he is called to serve, his obligation to be bound by the lease is discharged. Page 309 Concurrent conditions occur when each party’s performance is conditioned on the performance of the other. They occur only when the parties are required to perform for each other simultaneously. For example, when a buyer is supposed to pay for

goods on delivery, the buyer’s duty to pay is implied based on the seller’s duty to deliver the goods, and the seller’s duty to deliver the goods is implied based on the buyer’s duty to pay for the goods. The legal effect of a concurrently conditioned contract is that each party must offer to perform before being able to sue the other for nonperformance. Express and Implied Conditions Conditions in contracts are also described as being express or implied. Express conditions are explicitly stated in the contract and are usually preceded by words such as conditioned on, if, provided that, or when. For example, in a situation involving a potential sale of a house, the offer expressly required the buyer to make a deposit of $1,000 on acceptance. The buyer wrote “accepted” on the offer and returned it but did not include the deposit. No deposit of money was ever made. The seller then canceled the transaction. Several weeks later, the buyer attempted to tender payment to the seller. The court found that under the terms of the contract, payment of the $1,000 was an express condition of acceptance and, because the acceptance was incomplete, there was no contract.1 Implied conditions are those that are not explicitly stated but are inferred from the nature and language of the contract. For example, if a man enters into a contract with a builder to replace the windows in his house, there is an implied condition that the builder will be given access to the home so that they may fulfill their obligations under the contract. BUT WHAT IF. . . WHAT IF THE FACTS OF THE CASE OPENER WERE DIFFERENT? Let’s say in the Case Opener that the Lavington plant had agreed to continue to provide the glass to Anchor, but at a slightly increased price. Would that affect the use of the impossibility of performance defense? Sometimes conditions are confused with promises the parties are legally required to perform under the contract, sometimes referred to as covenants. Case 14-1 illustrates how the courts distinguish between conditions that must occur before a party’s duties under the contract, and covenants, the breach of which discharges the nonbreaching parties and gives rise to the payment of damages to that party. CASE 14-1 MIND & MOTION UTAH INVESTMENTS, LLC, APPELLEE v. CELTIC BANK CORPORATION Supreme Court of the State of Utah UT 94 (December 2015) FACTS: Mind & Motion entered into a real estate purchase contract (REPC) with Celtic Bank to buy a large piece of the bank’s foreclosed property. Although the county had approved plans to construct condominiums on the land, the former owner had not recorded the plats for the first phase of development, so the REPC required Celtic Bank to record the plats by a certain date. However, it also gave Mind & Motion sole discretion to extend the recording deadline as necessary to allow Celtic Bank enough time to record. It further provided that any extension of the recording deadline

automatically extended the deadline to complete the transaction. After extending the recording deadline once, Mind & Motion declined to extend it a second time and sued Celtic Bank for breach of contract. The district court granted summary judgment in Mind & Motion’s favor, concluding that the recording provision was unambiguously a covenant, not a condition. It then awarded Mind & Motion $100,000 in liquidated damages and more than $200,000 in attorney fees, as well as the return of Mind & Motion’s $100,000 earnest money deposit. On appeal, Celtic Bank argued that summary judgment was improper because the recording provision is unambiguously a condition. ISSUE: Was the term in the contract that the Celtic Bank would record the plots of land being sold under a condition that would give rise to a duty on the buyer’s part, or a covenant of the contract, the breach of which would discharge the buyer and give him the right to sue the bank for breach of contract? REASONING: Conditions are typically phrased using explicitly conditional terms. In this contract, the parties employed explicitly mandatory language to characterize the recording provision, while using explicitly conditional language elsewhere in the agreement. Therefore, there is no plausible way to read the recording provision as anything other than a covenant. CONCLUSION: The Court of Appeals upheld the district court’s grant of summary judgment in Mind & Motion’s favor, concluding that the recording provision was unambiguously a covenant, not a condition. CRITICAL THINKING How would one argue that the clause in question is a condition rather than a covenant? What additional facts might have led to a different outcome in this case? ETHICAL DECISION MAKING What ethical norms are furthered by this decision? How? Page 310 Discharge by Performance In most situations, parties discharge their obligations by doing what they respectively agreed to do under the terms of the contract; this is called discharge by performance. Parties also discharge their duty by making an offer to perform and being ready, willing, and able to perform. This offer of performance is known as a tender. If a painter shows up at Sherry’s house with his paint and ladders and is ready to start painting the garage, he has tendered performance. If Sherry refuses to let him start, the painter has now discharged his duties under the contract by his tender of performance and he may sue Sherry for material breach (discussed in detail later in this chapter). Types of Performance There are two primary kinds of performance: complete performance and substantial performance. Performance may also be conditioned on the satisfaction of a party to the contract or of a third party. Complete performance occurs when every aspect of the parties’ duties under the contract is carried out perfectly. In many instances, complete performance is difficult, if not impossible, to attain, and courts today

generally require only substantial performance. Substantial performance occurs when the following conditions have been met: (1) completion of nearly all the terms of the agreement, (2) an honest effort to complete all the terms, and (3) no willful departure from the terms of the agreement. Substantial performance discharges the party's responsibilities under the contract, although the court may require the party to compensate the other party for any loss in value caused by the failure to meet all the standards set forth in the contract. For example, if a contract called for all bedrooms of a house to be painted blue but one was inadvertently painted green, the court may require the contractor to compensate the buyer with the amount that it will cost the buyer to have that room repainted. The difficulty of determining whether there has in fact been substantial performance is illustrated in the following Case Nugget. Page 311 CASE Nugget A Substantial or Insubstantial Performance? Larry Pettit et al. v. Hampton and Beech, Inc., et al. Court of Appeals of Connecticut 101 Conn. App. 502, 922 A.2d 300 (2007) The plaintiffs contracted with the defendant for construction of a new house. They wanted their home to be a reverse image of the house depicted in the defendant's advertisement; they also modified the plans by widening the kitchen and great room and extending the rear of the house. There were some delays in the construction. At the time of the issuance of the certificate of occupancy, which was one day after the closing date specified in the contract, the plaintiffs gave the defendants a punch card of items to be fixed, placed $20,000 of the purchase price in escrow, refused to set a new closing date, moved into a motel, and sued the defendant, claiming the defendant failed to substantially perform the contract. The trial court found, pursuant to expert testimony, that reading and comprehending the blueprints provided by the plaintiffs were difficult for the framers and probably led to some of the shortcomings in the construction process. The court found that there were surface cracks in the concrete front porch because expansion joints were not installed and that the front steps, which were built to industry standards, had settled. The court further found that the porch could be repaired by resurfacing it and that the gap between the steps and the porch was a minor repair. The court awarded $3,238 to the plaintiffs to repair both problems. There were cracks in the foundation, not uncommon after construction, which could be repaired for $700. Rather than following the blueprint requirement, the defendant used an alternate construction that provided better structural support and complied with the building code. The court awarded $105 to attach a joist to an existing one to add additional support, although this might not be necessary structurally. The court found that a beam needed to be installed under the kitchen and awarded $250 for the

repair. Joint hangers were missing on the header and stringers of the stairway to the basement. Their omission was not a structural defect, and they easily could be installed at a cost of $75. Bridging and blocking were omitted or not nailed where ducts and pipes passed through joists, another nonstructural defect, and this could be remedied at a cost of $60. Settlement cracks in the walls, a common postconstruction phenomenon, could be repaired for $1,265. The court also awarded the plaintiffs $219.34 to replace a window over the garage. The plaintiffs appealed on grounds that the proper standard for substantial performance was not applied and thus they were entitled to more damages. In affirming the lower court's judgment that the defendant had substantially performed, the appeals judge said that issuance of a certificate of occupancy may be evidence of substantial performance; it is not dispositive of the question. Other factors include the extent to which the injured party will be deprived of the benefit reasonably expected, the extent to which that party can be adequately compensated for the deficiency of performance, the extent to which the performing party will suffer forfeiture, the likelihood that the performing party will cure his failure in light of the circumstances and his reasonable assurances, and the extent of good faith and fair dealing on the part of the performing party. Applying the factors to the case, the ruling of the trial court judge was not clearly erroneous, and therefore his judgment was affirmed. Page 312 Performance Subject to Satisfaction of a Contracting Party Sometimes the performance of the contract is subject to the satisfaction of one of the contracting parties. In such a case, a party is not discharged from the contract until the other party is satisfied. Satisfaction is considered an express condition that must be met before the other party's obligation to pay for the performance arises. Satisfaction may be judged according to either a subjective or an objective standard. When the judgment involved is a matter of personal taste, such as when a woman is having a dress custom-made for her, the courts apply a subjective satisfaction standard. As long as the person, in good faith, is not satisfied, the other party is deemed not to have met the condition. If the performance is related to a mechanical or utility standard, the objective satisfaction standard applies. Also, if the contract does not clearly specify that the satisfaction is to be personal, the objective standard applies. When an objective standard is used, the courts ask whether the reasonable person would be satisfied with the performance. Sometimes a contract is conditioned on the satisfaction of a third party. Usually, such provisions arise in construction contracts specifying that before a buyer accepts a building, an architect must provide a certificate stating that the building was constructed according to the plans and specifications. CASE 14-2 DORAN 610

APARTMENTS, LLC v. MERRITT Minnesota Supreme Court 2018 WL 3520983 (2018) FACTS: In July 2017, Latrice Merritt entered a residential lease with Doran 610 Apartments, LLC. Under the terms of the lease agreement, Merritt was prohibited from installing a private security system in her apartment. On July 18, 2017, a maintenance worker triggered a private security system Merritt installed while responding to a maintenance request. Doran informed Merritt that her private security system was in breach of the lease and that she must remove it as soon as pos-sible. In the following days, two false alarms occurred in which police arrived at Merritt's apartment. Both times, Merritt was not home and Doran was unable to deactivate the alarm. On July 31, Merritt and Doran signed an addendum to the lease that permitted Merritt to keep her security system by providing Doran with the access code to allow them to disarm the system to enter Merritt's apartment to respond to false alarms. Despite her agreement, Merritt was not forthcoming with the disarm code. Doran advised Merritt that her refusal to provide the code was a breach of the lease addendum. Merritt responded by stating that she would not provide the access code and instead provided an "emergency password." A Doran employee went to Merritt's apartment to see if the "emergency password" would disarm the system. It did not. Doran commenced an eviction action based on Merritt's breach of the lease addendum. The district court concluded that Merritt had materially breached the lease by failing to provide the access code. Merritt appealed. ISSUE: Had Merritt materially breached her lease by installing a security system? REASONING: First, Merritt challenges the district court's factual determination that she did not provide Doran with the access code. She argues that "[n]o witness called to testify against the defendant ha[d] personal knowledge of the fact in controversy," and she asserts that Doran's maintenance worker did not actually test the "emergency password" because the security system was not armed at the time he conducted the test. The record evidence defeats both assertions. On cross-examination, the maintenance worker who used the "emergency password" testified that the code provided to him did not disable the security system. Documentary evidence Doran submitted at trial establishes that use of the access code Doran requested—and Merritt was obligated to provide—would have itself armed the security system. And documents from Merritt's security company indicate that there are at least two different types of secondary security codes that would have met the lease addendum's requirement. Merritt implicitly acknowledged this in an August 24th email in which, after being told that she was still in breach, she tried to renegotiate the lease addendum by stating, "I will not give you the code access to my alarm and that is my right as a [t]enant . . . [but] I will [give] you the

emergency call code.” On this record, we discern no clear error by the district court in finding that Merritt breached her lease by failing to provide Doran with the access code. Second, Merritt contests the district court’s finding that her breach was material. The materiality of a breach is a question of fact. A breach is material when “one of the primary purposes” of a contract is violated. Landlords are obligated to provide tenants with a safe and habitable living environment. When a tenant’s breach of a lease provision interferes with her landlord’s ability to perform this duty, the breach is material. Merritt argues that “[l]andlords do not have the authority to determine a material breach through a lease that conveniently includes the term material breach for self-serving purposes.” This argument mischaracterizes the record and is unpersuasive. The district court did not base its materiality finding on the lease terms. Rather, the court found Merritt’s breach was material because it prevented Doran from entering her apartment when maintenance was needed and in emergency situations. According to the district court, “the issue is one for safety.” The record evidence supports this finding. Two of Doran’s witnesses testified that Doran needs access to individual apartments to perform repairs and to respond to emergencies. Merritt’s private security system failed, causing two false alarms, on two occasions. Doran’s maintenance supervisor testified that false alarms are disruptive and can compromise the safety of staff members who may be inside an apartment when police arrive. In sum, the record demonstrates Merritt’s breach implicated the safety and security of building residents—concerns that landlords are required to address. Accordingly, we conclude that the district court’s finding that Merritt’s breach was material is not clearly erroneous. DECISION AND REMEDY: AFFIRMED in favor of Doran. SIGNIFICANCE OF THE CASE: This case demonstrates how a court determines whether a contract has been breached, and whether that breach is material. CRITICAL THINKING What evidence, had it been present, might have led to a different outcome in this case? ETHICAL DECISION MAKING How might thinking about the universalization principle have prevented Merritt from materially breaching her contract? Page 313 BUT WHAT IF. . . WHAT IF THE FACTS OF THE CASE OPENER WERE DIFFERENT? Recall, in the Case Opener, that CPI manufactured Encore’s products in its factory. Let’s say that CPI simply stopped allowing the products in the factory. Would Encore be able to be discharged from the contract, or would Encore have to stay in the contract and find some sort of resolution? Anticipatory Repudiation Sometimes, a contracting party may decide not to complete the contract before the actual time of performance. This situation often arises when market conditions change and one party realizes that it will not be profitable

to carry out the terms of the contract. The breaching party may convey the anticipatory breach to the nonbreaching party either by making an express indication of their intent not to perform or by taking an action that would be inconsistent with their ability to carry out the contract when performance was due. Once the contract has been anticipatorily repudiated, the nonbreaching party is discharged from their obligations under the contract. They are free to go ahead and sue for breach and to find a similar contract elsewhere. However, if the nonbreaching party wishes, they may decide to give the party who repudiated the opportunity to change their mind and still perform. Discharge by Mutual Agreement Sometimes the parties to a contract agree to discharge each other from their obligations. They may do so through four primary means: discharge by mutual rescission, discharge by a substituted contract, discharge by accord and satisfaction, or discharge by novation. Page 314 Mutual Rescission Parties may agree that they simply wish to discharge each other from their mutual obligations and therefore may rescind or cancel the contract. For example, if James agreed to cater a graduation reception for Bill’s son but it appears that the child is not going to graduate when planned, James could agree not to hold Bill responsible for paying him the agreed-on cost for the catering in exchange for Bill’s agreement not to expect James to cater the reception. Substituted Contract Sometimes, instead of canceling the contract and terminating their relationship, the parties want to substitute a new agreement in place of the original. The substituted contract immediately discharges the parties from their obligations under the old contract and replaces those obligations with the new obligations imposed by the substituted contract. Accord and Satisfaction An accord and satisfaction is used when one of the parties wants to substitute a different performance for their original duty under the contract. The promise to perform the new duty is called the accord, and the actual performance of that new duty is called the satisfaction. The party’s duty under the contract is not discharged until the new duty is actually performed. Thus, it is the satisfaction that discharges the party. Novation Sometimes the parties to the agreement want to replace one of the parties with a third party. This substitution of a party is called a novation. The original duties remain the same under the contract, but one party is discharged and the third party now takes that original party’s place. All three parties must agree to the novation for it to be valid. Discharge by Operation of Law Sometimes a contract may be discharged not by anything the parties do but, rather, by operation of law. Alteration of the contract, bankruptcy, tolling of the statute of limitations, impossibility, commercial impracticability, and frustration of purpose are all situations in which a contract may be

discharged by operation of law. Alteration of the Contract The courts want to uphold the sanctity of contracts. Therefore, if one of the parties materially alters a written contract without the knowledge of the other party, the courts have held that such alteration allows the innocent party to be discharged from the contract. For example, if a seller, without knowledge of the buyer, changes the price of the contract, the buyer can treat the contract as terminated. Bankruptcy When a party files bankruptcy, the court allocates the assets of the bankrupt among the bankrupt's creditors and then issues the party a discharge in bankruptcy. Once the assets have been distributed, all the bankrupt's debts are discharged. (Bankruptcy is discussed in detail in Chapter 18.) Tolling of the Statute of Limitations The tolling of the statute of limitations, that is, the expiration of the time allowed by the statute, does not technically discharge a party's obligations under the contract. However, once the statute of limitations has tolled, neither party can any longer sue the other for breach, so for all practical purposes, the parties are no longer bound to perform. Impossibility of Performance Sometimes an unforeseen event occurs that makes it physically or legally impossible for a party to carry out the terms of the contract. In such a situation, the parties will be discharged on grounds of impossibility of performance. Courts distinguish between objective impossibility, meaning it is in fact not possible to lawfully carry out one's contractual obligations, and subjective impossibility, meaning it would be very difficult to carry out the contract. Objective impossibility but not subjective impossibility discharges the parties' obligations under the contract. Page 315 For example, if farmer Gray has a contract with the Hunts Corporation to provide it with 100 bushels of tomatoes on August 30 and a flood wipes out Gray's crop, it is not physically impossible for him to comply with the agreement. He has to go out on the market and purchase 100 bushels of tomatoes to ship to the Hunts Corporation. It may be inconvenient, and perhaps subjectively impossible, but it is not objectively impossible. In contrast, suppose farmer Jones owns a historic farmhouse built in 1827 and he agrees to sell it to Smith, but the night before the parties are to exchange money for the title, lightning strikes the farmhouse and it burns to the ground. It is now objectively impossible to comply with the terms of the contract, so the parties are discharged from their obligations. The historic farmhouse is not like tomatoes; the subject matter of the contract is forever destroyed and cannot be recreated. There are three main situations in which the courts find objective impossibility. The first is destruction of the subject matter, as in the example of the historic farmhouse destroyed by fire. If we go back to the example of the tomatoes, note that we said the farmer still had to perform because it was still possible for him to obtain tomatoes

elsewhere. To protect himself in the event that his crop was destroyed, farmer Gray could have drafted the contract to identify the subject matter as 100 bushels of tomatoes grown on the Smith family farm. In that case, if Smith's fields were flooded, it would be objectively impossible to comply with the contract because no tomatoes from the Smith farm exist. The second situation of objective impossibility is the death or incapacity of a party whose personal services are necessary to fulfill the terms of the contract. For example, if a famous artist is commissioned to paint a portrait and the artist dies, the contract is discharged. The artist's style is unique, and there is no way for anyone to take over the artist's role. The third situation is subsequent illegality. If the law changes after the contract was made, rendering the performance of the contract illegal, the contract is discharged. For example, Bill orders a case of a nutritional supplement from Osco Drugs and Supplements. Before his order can be filled, the nutritional supplement is banned because of recently discovered harmful side effects. The parties are now discharged from their duties because to sell the banned substance would be to violate the law. The opening scenario provides another example of impossibility of performance. The parties in the opening scenario do not dispute that the contract provided that "[t]he parties contemplate that the products (as hereinafter defined) shall be manufactured at CPI's Lavington facility" (the Lavington plant). When the Lavington plant was no longer available for production, it became impossible for Anchor to fulfill the terms of the contract. Ultimately, Anchor informed Encore that it considered itself discharged from the contract. Commercial Impracticability Commercial impracticability is seen by some as a response to a somewhat unfair harshness of the objective impossibility standard. Commercial impracticability is used when performance is still objectively possible but would be extraordinarily injurious or expensive to one party. Commercial impracticability arises when, because of an unforeseeable event, one party would incur unreasonable expense, injury, or loss if that party were forced to carry out the terms of the agreement. According to the Restatement (Second) of Contracts, Section 261 (1981), discharge by reason of impracticability requires the party claiming discharge to prove the following three elements: That an event occurred whose nonoccurrence was a basic assumption of the contract. That continued performance is not commercially practicable. That the party claiming discharge did not expressly or impliedly agree to performance in spite of impracticability that would otherwise justify his nonperformance. It is sometimes difficult to know whether the potential harm to the party seeking to avoid the contract is sufficient to give rise to the use of commercial impracticability. The doctrine is most commonly used

when raw materials needed for manufacturing goods under the contract become extraordinarily expensive or difficult to obtain because of an embargo, war, crop failure, or unexpected closure of a plant. Case 14-3 illustrates how the courts sometimes struggle to determine whether to apply the doctrine of commercial impracticability to discharge a contract. Page 316 CASE 14-3 THRIFTY RENT-A-CAR SYSTEM v. SOUTH FLORIDA TRANSPORT U.S. District Court for the Northern District of Oklahoma 2005 U.S. Dist. LEXIS 38489 FACTS: The plaintiffs, Thrifty Rent-A-Car System and its affiliates DTG and Rental Car Finance Corp., allowed South Florida Transport (SFT), the defendant, to establish a Thrifty franchise. In 2003, they entered into four agreements, providing SFT the right to use Thrifty's trademark and business methods in exchange for payment to Thrifty of licensing and administrative fees and requiring SFT to maintain a fleet of automobiles for rent. In July 2004, SFT provided DTG with a check as payment, but it was returned for insufficient funds. SFT continued to make delinquent payments, and by August, SFT owed Thrifty and DTG $1,134,819.40. Due to SFT's failure to make payments, Thrifty and DTG informed SFT that they would terminate the licensing agreements and repossess the vehicles, to which DTG had legal title. However, DTG agreed to postpone repossession due to predictions of severe weather and allowed SFT to continue renting vehicles until repossession was completed. When DTG repossessed the vehicles, DTG noticed that numerous cars were missing. SFT notified DTG that it had sold 51 vehicles without authorization. By August 2005, SFT owed Thrifty and DTG $4,238,249.53. SFT claimed that several hurricanes rendered its business operations commercially impracticable. The plaintiffs filed a motion for summary judgment, seeking full reimbursement for the debts SFT owed. ISSUE: Under what circumstances will commercial impracticability excuse nonperformance of a contract? REASONING: In the words of the court: The doctrine of commercial impracticability is typically invoked in cases involving the sale of goods. Codified in section 2-615 of the Uniform Commercial Code (UCC), which has been adopted by the Oklahoma legislature, the doctrine of commercial impracticability provides a defense to a seller for a delay in delivery or nondelivery of promised goods if performance has been made impracticable by a contingency, the nonoccurrence of which is an assumption of the contract. Commercial impracticability may excuse a party from performance of his obligations under a contract where performance has become commercially impracticable because of unforeseen supervening circumstances not within the contemplation of the parties at the time of contracting. UCC commentary provides that a party pleading commercial impracticability must demonstrate the "basic assumption" prong of the test

also found in the impracticability of performance context, that is, that the nonoccurrence of the supervening event was a basic assumption of the parties at the time of contracting. A rise or a collapse in the market standing alone does not constitute a justification for failure to perform. A contract is deemed commercially impracticable when, due to unforeseen events, performance may only be obtained at “an excessive and unreasonable cost . . . or when all means of performance are commercially senseless.” In applying the doctrine of commercial impracticability, the crucial question is “whether the cost of performance has in fact become so excessive and unreasonable that failure to excuse performance would result in grave injustice.” . . . The evidence strongly suggests that the non-occurrence of hurricanes was not a basic assumption of the parties’ agreements. Moreover, defendant provides no evidence to support a suggestion that the event of the hurricanes made the cost of performance of the terms of the agreements unduly burdensome, or even remotely more expensive. Finally, the Court observes, again, that SFT was behind on its payments to Thrifty and DTG before the arrival of the hurricanes in August 2004. No genuine issue of material fact exists, and the Court holds that the defense of commercial impracticability is unavailable to defendant. DECISION AND REMEDY: The plaintiffs’ motion for summary judgment was granted. SIGNIFICANCE OF THE CASE: This case illustrates how strictly courts look at the circumstances to determine whether to apply the doctrine of commercial impracticability. CRITICAL THINKING Especially given the increased rates of severe weather and natural disasters witnessed recently around the world, to what extent can parties entering into contracts reasonably be expected to plan for the effects of a rapidly changing global climate? ETHICAL DECISION MAKING What values do you think are furthered by the decision in this case? What values are being subordinated by this decision? Page 317 BUT WHAT IF. . . WHAT IF THE FACTS OF THE CASE OPENER WERE DIFFERENT? Let’s say that CPI left its factory to Anchor so that Anchor could still manufacture products for Encore as stated in the contract. However, manufacturing the products as CPI did would be outrageously expensive for Anchor. Does Anchor still have to remain in the contract with Encore? Frustration of Purpose Closely related to impracticability is frustration of purpose. Sometimes, when a contract is entered into, both parties recognize that the contract is intended to fulfill a particular purpose, and the occurrence of that purpose is said to be a basic assumption on which the contract is made. If, due to factors beyond the control of the parties, the event does not occur, and neither party had assumed the risk of the event’s nonoccurrence, the contract may be discharged. This doctrine arose from the so-called coronation cases in

England. Numerous parties had contracted for rooms along the parade route for the king’s coronation, but the king became ill and the coronation was canceled. The courts held that the parties’ duties under the room contracts should be discharged and that any payments made in advance should be returned because the essential purposes of the contracts could no longer be fulfilled, through no fault of any of the parties. Again, this doctrine is not frequently used. For example, if you contract for an organist to play at your daughter’s wedding but the groom gets cold feet at the last moment and the wedding is canceled, you cannot use frustration of purpose to discharge the contract because the groom’s reversal was a foreseeable event, even though it was unlikely. The following Case Nugget illustrates how the courts sometimes struggle with whether to apply the frustration of purpose document. CASE Nugget A Frustrated Purpose? Convenience Store Leasing and Management v. Annapurna Marketing 933 N.W.2d 110 (Wis. App. 2019) Two friends, Buddi Sebedi and Bawsudev Adhikari, formed Annapurna Marketing to operate gas stations. Annapurna Marketing purchased a defunct gas station from Bulk Petroleum Corporation and executed a fuel supply agreement (FSA) to supply fuel for the station. The FSA provided that Annapurna would purchase 180,000 gallons of fuel from Bulk Petroleum for 1.5 cents above “the Branded Supplier rack price.” In turn, Bulk Petroleum would find a branded supplier from which to source the fuel. The agreement allowed Bulk Petroleum to find any branded supplier and required Annapurna to comply with the selected supplier’s branding. Although the FSA was supposed to take effect 10 days after being executed, Bulk Petroleum had trouble finding a branded supplier. Bulk Petroleum eventually signed a contract to be supplied with ExxonMobil branded fuel over five months later. The ExxonMobil deal also required Bulk Petroleum to purchase at least 480,000 gallons per year, more than the 180,000-gallon minimum under the FSA. Moreover, ExxonMobil required Annapurna to update the station’s façade and move the bathroom into the structure before selling fuel. Faced with higher fuel purchase requirements and seemingly expensive renovations, Annapurna decided to quit by walking away. Bulk Petroleum sued Annapurna for breach of contract. The trial court accepted the defendant’s arguments for the FSA breach of contract claim. The court agreed in a bench trial that the bathroom renovations required to sell ExxonMobil-branded fuel constituted frustration of purpose. Bulk Petroleum appealed the decision. The appellate court first found that frustration of purpose was a matter of law that they could review independently. The court then recited the elements of the defense from the Restatement (Second) of Torts, noting that it is difficult to prove that the “party’s principal purposes in

making the contract are frustrated.” The appeals court also noted that according to the Restatement, a contract’s purpose does not become frustrated just because circumstances make it less profitable. Annapurna tried to argue that the FSA’s principal purpose was to “open the station without delay and sell fuel at a profit.” Based on their framing, the defendants contended Bulk Petroleum’s five-month delay, and the costly burden of bathroom renovations, frustrated that purpose. The appellate court rejected that argument, citing the FSA’s terms, which stated its principal purpose was “to supply fuel for sale at the new gas station.” The trial court’s decision was reversed, and the FSA breach claim was remanded to the lower court. What do you think should have happened when the case was remanded for a new trial? Page 318 Exhibit 14-2Methods of Discharging a Contract Discharge by conditions If precedent, concurrent, implied, and express conditions are not met or subsequent condition occurs. Discharge by performance If a party performs the terms of the contract or makes a tender (an offer to perform), or if the party performs to the satisfaction of the contracting party. Discharge by material breach If a party fails to substantially perform his obligations, thereby justifying that the nonbreaching party be discharged from the contract. Discharge by mutual agreement If the parties mutually agree to discharge one another, substitute a new contract, substitute a party, or substitute a different performance. Discharge by operation of the law If one of the following occurs: alteration of the contract, bankruptcy, tolling of the statute of limitations, impossibility, commercial impracticability, or frustration of purpose.

Remedies LO 14-2 Recognize the primary legal remedies available for a breach of contract. The fact that one party has breached a contract does not necessarily mean that the nonbreaching party will sue. A number of factors go into the decision of whether it makes sense to file suit. Some of those considerations are (1) the likelihood of success, (2) the desire or need to maintain an ongoing relationship with the potential defendant, (3) the possibility of getting a better or faster resolution through some form of alternative dispute resolution, and (4) the cost of litigation or some form of alternative dispute resolution (ADR) compared to the value of the likely remedy. The remedies the potential plaintiff will be thinking about can generally be classified as either legal remedies (also known as money damages) or equitable remedies, some form of court-ordered action. The distinction between legal and equitable remedies can be traced back to a time in our legal system’s English roots when, instead of one unitary legal

system, there were two separate courts, a court of law and a court of equity. When parties were seeking money damages, they went to the court of law; but when parties needed any remedy other than money damages, they went to the High Court of Chancery, which was a court of equity. When the United States was establishing its legal system, it combined both these types of powers in a unitary system. The reasons for this joinder are not known, but it seems likely that the primary reason was that the early colonists simply did not have the resources to support separate systems. The courts did, however, still maintain the distinction between legal and equitable remedies. However, unlike judges in the old English courts, judges in the U.S. system have the power to award both legal and equitable remedies in the same case. This section discusses these various remedies. Page 319 GLOBAL Context Sunflowerr/Shutterstock Damages for Breach of Contract: Not the Preferred Remedy in Latvia In the United States, equitable remedies are rarely given; legal remedies are awarded whenever possible. Consequently, some parties will opt to voluntarily breach a contract and pay damages rather than fulfill a contract because doing so may prove to be more cost-effective. In Latvia, however, each party is expected and legally obligated to fulfill its side of the bargain. Damages for breach are an option only in the most extreme cases where fulfilling the contract would prove impossible. Effectively, parties are barred from backing out of a contract, as doing so is not only illegal but considered highly immoral. Thus, specific performance is often the only remedy available in Latvian contract disputes. Legal Remedies (Monetary Damages) Monetary damages are also referred to as legal damages, and they include compensatory, punitive, nominal, and liquidated damages. Whenever possible, courts award monetary damages rather than some form of equitable relief. Compensatory Damages The most frequently awarded damages are compensatory damages, damages designed to put the plaintiff in the position he would have been in had the contract been fully performed. These damages are said to compensate the plaintiff for his loss of the benefit of the bargain. He can recover, however, only for those provable losses that were foreseeable at the time the contract was entered into. Sometimes, the plaintiff actually may have no losses. Suppose, for example, that Dr. Wilcox hires Jeremy to work exclusively as his research assistant during the fall semester, for a salary of $2,000 per month. If Wilcox breaches the contract and terminates Jeremy for no reason with two months left on the contract, and the only job Jeremy can get as a substitute pays only $500 per month, Jeremy is entitled to compensatory damages of $3,000. However, if Jeremy gets a new job that pays $2,500 per month, he is actually better off now, so he has no compensatory damages. Sometimes these damages are

referred to as expectation damages because they compensate a person for the benefit she or he expected to gain as a result of entering into the contract. In addition to losing the benefit of the bargain, the plaintiff may suffer other losses caused directly by the breach. These losses may be compensated as incidental damages. For example, because Jeremy was unfairly terminated before his contractual term was over, he may have to spend money to find another job. His job search expenditures would be considered incidental damages. Some kinds of contracts have special rules for determining their compensatory damages, namely, contracts for the sale of goods, contracts for the sale of land, and construction contracts. Each of these is discussed in a little more detail in the following sections. Contracts for the sale of goods are governed today by the Uniform Commercial Code. If the seller breaches the contract, compensatory damages are generally calculated as the difference between the contract price and the market price on the day the goods were supposed to be delivered, plus any incidental damages resulting from the breach.2 In other words, this measure of damages is the difference between what the buyer would have paid for the goods under the contract and what he or she now must pay to obtain the goods from another seller. Occasionally, however, the buyer may have no damages because the market price of the goods is lower than the parties had anticipated it would be at the date of delivery, so the buyer can now actually purchase the goods at a lower price than the contract price. Page 320 If the buyer breaches before accepting the goods, the seller would be able to resell the goods and recover as compensatory damages the difference between the price he sold the goods for and the contract price, plus any incidental expenses associated with the sale.3 If the seller is unable to sell the goods to another buyer, as might be the case, for example, with shirts embroidered with a company’s monogram, then the seller may be entitled to the contract price as damages. If the buyer breaches before the goods are even manufactured, the seller’s damages would typically be based on the profits that would have been made from the sale. In construction contracts, contracts whereby an owner enters into an agreement to have a building constructed, damages are calculated differently depending on who the breaching party is and what stage the construction is in when the breach occurs. If the contract is breached by the owner before the construction is begun, damages are simply lost profits, which are calculated by subtracting the projected costs of construction from the contract price. For example, if Cameron Construction Company anticipates building a warehouse for the Johnson Corporation and the contract price is $500,000 and the cost of raw materials and labor is $420,000, Cameron could recover $80,000 in lost

profits if Johnson were to breach the contract before performance had begun. If, however, Cameron Construction had already expended $20,000 on materials and labor on the job when the breach occurred, the company would be able to recover $100,000 in damages because the amount of damages when construction is in progress is measured by the lost profits plus any money already invested in the project. And if the breach by Johnson had occurred after construction was completed, then Cameron would be entitled to recover the entire contract price, plus interest from the time payment for the project was due. If the construction company, or contractor, breaches the contract before or during the construction, the owner's damages are generally measured by the cost of hiring another company to complete the project, plus any incidental costs associated with obtaining a new contractor and any costs arising from delays in the construction project. If the contractor completes the job but finishes after the date for completion, the owner is entitled to damages for the loss of the use of the building that they would have had if the contract had been completed in a timely manner. Consequential Damages It should be apparent by now that contract law requires greater certainty in the proof of damages than does tort law. Damages are not recoverable for breach of contract unless they can be proved with a high degree of certainty. One type of damages in contract cases that is often especially difficult to prove is what are called consequential or special damages. Consequential damages are foreseeable damages that result from special facts and circumstances arising outside the contract itself. These damages must be within the contemplation of the parties at the time the breach occurs. In the Case Nugget that follows, the court distinguishes consequential damages from the damages that arise naturally from a breach of contract. Punitive Damages Just as in tort law, punitive damages in contract law are designed to punish the defendant and deter engagement in similar behavior in the future. Because the primary objective of contract law, however, is to ensure that parties' expectations are met, punitive, or exemplary, damages are rarely awarded. Most jurisdictions award them only when the defendant has engaged in reprehensible conduct such as fraud. The primary factor in determining the amount of punitive damages is how much is necessary to punish the defendant; thus, the amount depends on matters such as the wealth and income of the defendant. Nominal Damages If no actual damages resulted from the breach of contract, the court may award the plaintiff nominal damages. The award is typically for $1 or $5, but it serves to signify that the plaintiff has been wronged by the defendant. Page 321 Liquidated Damages Typically, the court determines the amount of damages to which a non-breaching party is

entitled. Sometimes, however, the parties recognize that if there is a breach of contract, it will probably be somewhat difficult for the court to determine exactly what the damages are. To prevent a difficult court battle, the parties specify in advance what the liquidated damages will be if there is a particular kind of breach. The parties specify these damages in what is called a liquidated- or stipulated-damage clause in the contract. The damages may be specified as either a fixed amount or a formula for determining how much money is due. Such clauses are frequently used in construction contracts when the buyer needs to know that the property will be available by a specific date so that they can make plans for moving in. In such a case, the parties may estimate in advance what it will cost the buyer for storage and temporary housing if the property is not ready by the specified date. The courts generally enforce such clauses as long as they appear to bear a reasonable relationship to what the actual costs will be. If the amount specified is so unreasonable as not to bear any logical relationship to foreseeable costs, the courts declare the clause a penalty clause and do not enforce it. In Case 14-4, the court had to decide whether the clause at issue was an unenforceable penalty clause or a valid liquidated-damage clause. CASE Nugget A Classic Case of Consequential Damages Hadley v. Baxendale Court of Exchequer 156 Eng. Rep. 145 (1854) The plaintiffs were millers whose mill was stopped when the crankshaft of the mill broke. They sent the shaft to Greenwich to be used as a model for a new crank. The plaintiffs' servant took the shaft to the defendant, a common carrier, and told the defendant's clerk that the mill was stopped and that the shaft must be sent immediately. At the time, however, most mills would have had extra crankshafts around somewhere, so without more being said, the clerk would not have known that the mill would not be soon back and running on a spare shaft. The clerk said the shaft would be delivered at Greenwich on the following day. The defendant's clerk was told that a special entry, if required, should be made to hasten the shaft's delivery. The delivery of the shaft at Greenwich was delayed by some neglect, and, consequently, the plaintiffs did not receive the new shaft for several days after they would otherwise have received it. During that time, the mill was shut down, and the plaintiffs thereby lost the profits they would have received had the shaft been delivered on time. They sought to recover damages for lost profits during that time. The defendant argued that the lost profits were "too remote." The court decided for the plaintiffs and allowed the jury to consider the lost profits in awarding damages. The defendant appealed. On appeal, the appellate judge set forth what has come to be the standard for consequential damages: Where two parties have made a contract which one of them has

broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, that is, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them. In this case, the judge did not believe that the special circumstances had been communicated to the defendant. Thus it would have been unjust to hold the defendant liable for the damages, which he would not have contemplated as arising from the delayed delivery of a shaft. Page 322 CASE 14-4 S. BROOKE PURLL, INC., T/A PURLL CONSTRUCTION v. PATRICK DARRELL Vailes District of Columbia Court of Appeals 850 A.2d 1135 (2004) FACTS: The plaintiff hired the defendant to renovate his house and paid him a $5,000 initial payment under the construction contract but failed to do initial demolition work required under the contract. The contract contained a clause stating The [owner] further agrees that if he shall cancel this Contract for any reason, whatsoever, then he shall pay to the contractor as fixed and liquidated damages, without proof of loss, the sum of money equal to Thirty Five Percent (35%) of the full contract price hereinabove stated. Furthermore, if it becomes necessary for the Contractor to file suit or take other legal action on this Contract because of a breach on the part of the party of the second part, the party of the second part agrees to pay reasonable attorney fees and court cost. The plaintiff sued the defendant contractor for return of his deposit, and the defendant counterclaimed for $36,102 and attorney fees, the amount that would be required under the liquidated-damage clause. The trial court held that the plaintiff had breached the contract, but it found the liquidated-

damage clause to be an unenforceable penalty clause and awarded the contractor $1,722. The defendant appealed. ISSUE: Was the clause imposing a payment of 35 percent of the contract value for breach by the owner a penalty clause or a valid liquidated-damage clause? REASONING: Today, the trend is toward furthering freedom of contract through the enforcement of stipulated-damage provisions as long as they do not clearly disregard the principle of compensation. Such clauses simplify the resolution of a breach-of-contract dispute and give the parties an opportunity to resolve the damage question without resorting to litigation, by setting the measure of damages at the outset, before a breach even occurs. Such provisions are especially appropriate when the parties enter into a contract in which the damages are uncertain in amount and cannot be easily ascertained. Thus, the courts tend to uphold these clauses unless they are clearly unreasonable. The liquidated sum must simply bear a reasonable relation to the damages foreseeable at the time the contract was made. The burden of proof is on the breaching party to demonstrate that the damage clause is disproportionate to the foreseeable damages. In this case, the plaintiff provided no such evidence. The full contract price was $103,148.71. The contractor testified without contradiction that two-thirds of the contract price represented materials and labor and one-third represented his profit. The contractor explained that he consulted the Ames Construction Guide for the D.C. metropolitan area, which was customarily used in the industry for pricing construction jobs, in establishing his price. Thus, there was no evidence that the clause was unreasonable. The trial court had inappropriately struck the clause down because the contractor had failed to introduce evidence of his out-of-pocket expenses; such proof is not required to uphold a liquidated-damage clause. DECISION AND REMEDY: The lower court’s decision was reversed, in favor of the defendant contractor. SIGNIFICANCE OF THE CASE: This case illustrates the preference for upholding liquidated-damage clauses. CRITICAL THINKING What evidence could the plaintiff have presented that might have changed the outcome of this case? ETHICAL DECISION MAKING The courts place the burden of proving the unreasonableness of a liquidated-damage clause on the breaching party. Which stakeholders benefit by this approach? Which stakeholders are disadvantaged by it? Page 323 GLOBAL Context CGinspiration/E+/Getty Images The Increasing Awarding of Punitive Damages in Mexico Numerous countries around the world do not award punitive damages, and even condemn such court practices as being too subjective and unreasonable. Despite these criticisms, many believe that Mexico has recently entered the judicial practice of awarding punitive damages to plaintiffs in civil lawsuits. Punitive damages and compensation

are not present in Mexican legislation or in the Mexican Civil Code. However, in a 2014 Mexican Supreme Court decision, the court expressly used the term “punitive damages” when moral damages were awarded to the plaintiff in a case that involved an accidental death at a hotel resort. Since this case, the number of claims for punitive damages in Mexico has increased. Although this 2014 decision is not a binding precedent, it is thought to be a strong initiation of change in Mexico’s jurisprudential direction—a change that some believe will serve as a preventative measure against nightmare scenarios that result in accidental death and injury. Sources: https://www.hoganlovells.com/en/publications/~/media/d6f4394ded6a4a5fabbf9d42142ffcf5.ashx; http://www.davidpublisher.com/Public/uploads/Contribute/5c1700b779c3e.pdf Since this case, the number of claims for punitive damages in Mexico has increased. Although this 2014 decision is not a binding precedent, it is thought to be a strong initiation of change in Mexico’s jurisprudential direction—a change that some believe will serve as a preventative measure against night-mare scenarios that result in accidental death and injury. Thus, if you are the manager of a hotel, and a person who had booked 10 rooms for the week calls to cancel all the reservations, you have a duty to attempt to rent the rooms to minimize the damages. The mitigation must be reasonable, however, and no one is expected to settle for less than what was contemplated under the contract in order to mitigate the damages. One area in which interesting mitigation issues arise is when an employee is wrongfully discharged and must seek new employment to mitigate their damages. If the employee does not seek alternative employment, the amount of lost wages recovered as damages will be reduced by the amount the employee reasonably could have earned in another job. If the employee does not find another job, the court must decide whether the employee could have found comparable alternative employment with reasonable effort. For example, in 1970, the California Supreme Court considered a classic case that involved an actress who was contracted to star in a musical motion picture that was to be filmed in the United States but was canceled prior to production. The court held that the requirement to mitigate damages did not require the actress to accept as an alternative a starring role in a western drama being filmed in Australia.4 EQUITABLE REMEDIES LO 14-3 Recall the primary equitable remedies available for a breach of contract. As noted earlier, equitable remedies grew out of the English court’s authority to fashion remedies when the existing laws did not provide adequate ones. These remedies were typically unique solutions specifically crafted to the demands of the situation. Today, the most common equitable remedies

include rescission and restitution, orders for specific performance, and injunctions. As a carryover from the days of the English courts of law and equity, a party seeking equitable relief must meet five requirements. The party must prove that (1) no adequate legal remedy is available, (2) irreparable harm to the plaintiff may result if the equitable remedy is not granted, (3) the contract is legally valid (except when seeking relief in quasi-contract), (4) the contract terms are clear and unambiguous, and (5) the plaintiff has “clean hands,” that is, has not been deceitful or done anything in breach of the contract. Rescission and Restitution Sometimes the parties simply want to be returned to their precontract status; they want to have the contract terminated and to have any transferred property returned to its original owner. That is, they want rescission and restitution. Rescission is the termination of the contract, and restitution is the return of any property given up under the contract. Restitution and rescission are most frequently awarded in situations in which there is a lack of genuine assent (discussed in Chapter 12). When a party enters into a contract because of fraud, duress, undue influence, or a bilateral mistake, the contract is voidable and the party who wants out may seek to avoid the contract or, in other words, seek rescission and restitution. Page 324 E-COMMERCE and the Law The Oversight Board If your post is banned on Instagram or your Facebook account terminated, there is usually no recourse. There are no courts that would grant an injunction to stop banning your posts or give you back your account. While there may not be a legal court, there is now an extralegal court to which you can appeal. The Oversight Board is Facebook’s attempt at creating a self-styled court. Financed by Facebook through a $130 million legally independent trust fund, the Oversight Board was created by Facebook to make binding decisions on whether certain content should be allowed or removed from Facebook and Instagram. The first 20 board members, made up of free speech experts from across the globe, were announced in May 2020. They accepted their first “cases” in October 2020. Early decisions seem to encourage Facebook to show greater respect for principles of free expression and highlighted the necessity for Facebook to clarify vague language in its guidelines for reviewing content. The first cases included a question of whether pictures with exposed nipples in a post raising breast cancer awareness violated Facebook’s Adult Nudity policy, and in that case the Board overturned Facebook's removal of the pictures, noting that the pictures fell under an exception to the nipple ban for raising awareness of health issues and encouraged Facebook to use more human oversight of automated system removals. In another early case, the board evaluated whether content posted in a public forum for Indian Muslims was likely to

incite violence. The decision asks that Facebook publicly clarify what type of “veiled threats” are permissible and what the enforcement of this restriction entails. And in a surprising decision, the board overturned Facebook’s decision to remove a post containing inaccurate information about the COVID-19 pandemic for violating its misinformation and imminent harm rule. In making its decision, the board found Facebook’s misinformation and imminent harm rule to be “inappropriately vague” and contradictory to international human rights standards. The board suggested that Facebook create an updated standard on health misinformation which clarifies already-existing rules and defines important terms such as misinformation. Fascinatingly, the Oversight Board accepted a referral in January 2021 to examine Facebook’s decision to suspend Donald Trump indefinitely. Facebook has stated that the Oversight Board’s decisions are binding but has carved out a narrow exception for itself: Facebook does not have to follow the Oversight Board’s decision if they violate the law. Which law? Laws from which country? If Facebook was already going to follow the law, why do you think it took the trouble to create an extralegal judiciary to decide its policies? Do you think they were concerned about being sued for breach of contract by suspended users or users whose posts were removed? Sources: https://www.nytimes.com/2021/01/24/business/media/trump-facebook-oversight-board.html; Facebook Oversight Board Co-Chair on Determining the Future of Trump’s Accounts, https://www.npr.org/sections/insurrection-at-the-capitol/2021/01/23/959987896/oversight-board-co-chair-on-how-it-determines-trumps-fate-on-facebook Specific Performance Specific performance is sometimes called specific enforcement. It is an order requiring the breaching party to fulfill the terms of the agreement. Courts are very reluctant to grant specific performance and will do so only when monetary damages simply are not adequate, typically because the subject matter of the contract is unique. If the subject matter of the contract is unique, then even if the nonbreaching party is given compensation, they cannot go elsewhere to buy the object from someone else, so this renders any kind of money damages inadequate. Primarily for historical reasons, every piece of real property is considered unique. Therefore, an order for specific performance would often be the appropriate remedy for the breach of a contract for the sale of a piece of real estate. Under the UCC, orders for specific performance of a contract for the sale of goods may be awarded “where the goods are unique or in other proper circumstances.”5 Although the other circumstances have not been delineated by the UCC, the case law reveals that a commonly accepted circumstance is one in which the good is scarce or is no longer being produced and therefore would be difficult to

obtain on the open market. Injunction An injunction is an order either forcing a person to do something or prohibiting a person from doing something. Most commonly, injunctions are prohibitions against actions. Such an injunction might be used, for example, as a remedy in a contract case involving a personal service. Mandy is a lounge singer, and she has a contract to perform at JZ's Lounge every weekend night from January through June. Two months into her contract, she decides to go work for Bally's Lounge instead because Bally's will pay her twice as much money. There is no way to calculate the damages adequately that would arise from the singer going over to the other club to perform, so money damages would not really be an adequate remedy. Instead, the owner of JZ's may obtain an injunction prohibiting Mandy from performing in any lounge until the end of June, when her term of performance under the contract will have been completed. Page 325 Sometimes, when a party is suing another for breach of contract, one of the parties is concerned that before the court has had a chance to decide the case, the other party will do something to make it impossible for the concerned party to get the relief they would be entitled to. In such a situation, the concerned party may ask for a preliminary injunction to prohibit the other party from taking any action during the course of the lawsuit that would cause irreparable harm to any of the parties to the contract. For example, Jim agrees to sell Bob a very rare antique car for $15,000 but then says he will not comply with the terms of the agreement. Bob sues Jim for breach of contract, but before the case goes to trial, Bob finds out that Sara has told Jim that she is willing to pay him $20,000 for the car. Bob may seek a preliminary injunction to prohibit Jim from selling the car to anyone else until the court decides whether Bob is entitled to an order for specific performance forcing Jim to sell the car to him. Thus, the preliminary injunction fulfills the purpose of maintaining the status quo until the case can be finally decided. Reformation Sometimes a written contract does not reflect the parties' actual agreement, or there may be inconsistencies in the contract, such as the price being listed as "$200,000 (twenty thousand dollars)." In such a case, the written document may be rewritten to reflect what the parties had agreed on. Recovery Based on Quasi-Contract When an enforceable contract does not in fact exist, the court may grant a recovery based on quasi-contract; that is, the court may impose a contract-like obligation on a party to prevent an injustice from occurring. Recovery in quasi-contract is often sought when a party thought a valid contract existed and gave up something of value in relying on the existence of a contract. To recover under a theory of quasi-contract, a plaintiff must prove that (1) the plaintiff conferred a benefit on the defendant, (2) the plaintiff had reasonably

expected to be compensated for the benefit conferred on the defendant, and (3) the defendant would be unjustly enriched from receiving the benefit without compensating the plaintiff for it. GLOBAL Context Sunflowerr/Shutterstock Remedies for Breach of Contract in Latvia In the United States, breach of contract is a common occurrence. In fact, many parties will opt to voluntarily breach a contract and pay damages rather than fulfill a contract because doing so may prove to be more cost-effective. In Latvia, however, each party is expected and legally obligated to fulfill its side of the bargain. Damages for breach are an option only in the most extreme cases where fulfilling the contract would prove impossible. Effectively, parties are barred from backing out of a contract, as doing so is not only illegal but considered highly immoral. Thus, specific performance is often the only remedy available in Latvian contract disputes. CASE OPENER WRAP-UP Impossible Wine Bottles Under the amended agreement between Anchor and Encore, the production of bottles was to take place at the Lavington plant. The Lavington plant was the only facility owned by CPI that was capable of producing the specific type and quality of glass container that is required by the wine industry. According to the court's ruling, when the Lavington plant was sold and the new owners did not take over CPI's obligations, the terms of the contract became impossible for Anchor to meet. As a result of the impossibility of performance, Anchor was discharged from the contract. Page 326 PRACTICAL TIPS for Business Managers If your need for a particular contract is contingent on the occurrence or nonoccurrence of a particular event, then make sure you make that contract a conditional one. Include a clause in the contract making it conditioned on that event either happening or no longer happening. When you know that you will have damages if a contract is not performed on time, and the damages may be difficult to calculate or prove, be sure to include a liquidated damages clause in the contract. When drafting a liquidated damages clause, to be safe, err on the side of making the amount of the award on the low side because you do not want the award to be thrown out as being an unreasonable penalty clause. The better you can substantiate the basis for your stipulated award, the more likely it is to be upheld.

SUMMARY Methods of Discharging a Contract Contracts may be discharged in a number of ways, including The occurrence of a condition subsequent or the nonhappening of a condition precedent. Complete or substantial performance. Material breach. Mutual agreement. Operation of law. Remedies Courts may grant parties in a breach-of-contract action legal or

equitable remedies. Legal remedies, or money damages, include Compensatory damages. Nominal damages. Punitive damages. Liquidated damages. Equitable remedies, which are granted only when legal remedies are inadequate, include Restitution and rescission. Specific performance. Injunction.

Point/Counterpoint Should Specific Performance Automatically Be Granted in Every Breach of Contract for the Sale of Real Property? YES NO Clearly, monetary damages can be used to compensate a person for almost any claim that a piece of real estate is so unique that only that specific piece of real estate will satisfy the party's expectations for a contract. Monetary damages can be added to the value of almost any real estate transfer to equalize the value of the new piece of real estate with the value of the disputed land. Imagine, for example, a new subdivision with 500 lots on which homes will be built. It is standard practice to recognize that some of these lots are identical in value, while others require a monetary premium to make them more comparable in value. You may argue that you don't want just any plot in the subdivision, but one with some specific feature, such as a certain amount of trees. Almost any feature you want on your real estate can be created for the right price. So you figure out how much it will cost you to turn a piece of property you can purchase into the property of your dreams, and that amount would be your damages. There is no reason to assume that every piece of property is unique and, therefore, that all real property buyers are entitled to specific performance. The uniqueness of each piece of real estate is clear. Any buyer of real estate has an extensive array of choices. They may, in some instances, take years to make their selection of a specific piece of real estate. Why does the process of purchasing real estate involve so much deliberation and comparison of alternatives? The buyer of real estate is not looking for just any piece of real estate. The buyer is looking for one distinct property. The buyer considers future value, neighboring properties, revenue possibilities, and maintenance costs, among multiple other factors, before settling on one special, unique property. No other property satisfies those criteria for that buyer. Therefore, every piece of real estate is unique, which entitles the buyer to specific performance for a seller's breach.

Questions & Problems Explain the difference between legal and equitable remedies. Explain how the existence of conditions subsequent and precedent affects the discharge of a contract. Explain the relationship between commercial impracticability and frustration of purpose. Developer Foxwood Estates (Developer) subdivided most of its property into 38 single-family homesites, called the Foxwood Estates subdivision. The land in dispute is the remaining property, which was a 30-acre undeveloped parcel immediately adjacent to the subdivision. In marketing and selling the lots, the Developer made specific representations as to the land in dispute, both orally and in the documents distributed. Developer provided prospective buyers with topographic and setback maps detailing the numbered lots and labeling the land in dispute as either “Outlot 1” or “Outlot 1 [and] Outlot 2.” The setback map was attached to the Declarations of Restrictions and Covenants (the Declarations) which were given to prospective buyers and became part of an actual buyer’s purchase contract. The Declarations expressly stated that the Homeowners’ Association, not the Developer, would own the outlots. The Developer also provided prospective buyers with a brochure that referred to the secluded, natural feel of the subdivision, stating: “Foxwood Estates is an exceptional community designed and reserved for individuals who desire a lifestyle amidst the grandeur of nature, and who will appreciate the preservation of this natural habitat.” The brochure included an aerial view showing the subdivision, including the land in dispute, bordered in red. When one of the homeowners read in the newspapers that the land in dispute had been approved for multifamily housing, he notified the Homeowners’ Association, and the association filed suit against the developer, seeking specific performance of its promise to transfer title to the land in dispute to the Homeowners’ Association. The trial court ordered defendant Foxwood Estates LLC (the Developer) to convey to Foxwood Estates Homeowners’ Association the land in dispute to the Foxwood Estates subdivision. The developer appealed. How do you think the court of appeals resolved the appeal? Why? Source: Foxwood Estates Homeowners’ Association, Inc. v. Foxwood Estates, LLC, 364 Wis. 2d 405; 866 N.W.2d 40 (2015). Zachary and Carrie Sexton (the Buyers) were searching for a home in the Kingswood neighborhood of Atlanta, Georgia. The Buyers’ real estate agent learned that Russell and Linda Sewell (the Sellers) planned to place their home up for sale in the near future. Before the Sellers listed the home for sale, the Buyers toured it and offered to purchase it for $1,775,000. The Buyers’ agent drafted a purchase and sales agreement, which the parties executed the same day, March 31, 2017. Alongside signing the agreement, the Buyers put down $40,000 in earnest money. The agreement provided a two-week due

diligence period, during which the buyers could rescind the contract without incurring a penalty. During that period, the home was appraised for $1,850,000, or $75,000 more than the contract price. On May 13, about one month after the due diligence period had expired, and almost six weeks before the closing date, the Buyers informed the Sellers that they were moving to North Carolina. The Buyers assured the Sellers that they were still interested in purchasing the home, which they would then resell. Thus, the Buyers asked the Sellers to allow them to show the property to other potential buyers. The Sellers allowed the Buyers to show the home on one day, May 17, but no re-sale resulted. The Sellers did not allow the Buyers any additional days to show the home. Page 328 On May 22, the Buyers notified the Sellers that they intended to unilaterally terminate the agreement, and they relinquished the $40,000. The Sellers refused the offer, and the Sellers's attorney informed the Buyers that if they failed to appear at the closing on June 22, the Sellers would pursue an action seeking specific performance on the contract. Sure enough, the Buyers failed to close the property and the Sellers filed suit. The Sellers prevailed, and the Buyers appealed, arguing that specific performance is an inappropriate remedy in this case. Is this a case where specific performance can be invoked? How did the appellate court rule? Source: Sexton v. Sewell, 830 S.E.2d 605 (Ga. App. 2019) On April 20, 2009, Severn and IFC entered into a Pesticide Application Agreement (PAA) requiring IFC to use phosphine, a pesticide, to fumigate a peanut storage dome owned by Severn and located in Severn, North Carolina. The PAA required IFC to apply the pesticide "in a manner consistent with instructions . . . and precautions set forth in [its] labeling." In return for IFC's services, Severn promised to pay IFC $8,604, plus applicable sales taxes. The contract specified that this $8,604 sum was not "sufficient to warrant IFC assuming any risk of incidental or consequential damages" to Severn's "property, product, equipment, downtime, or loss of business." On August 4, 2009, IFC improperly dumped approximately 49,000 tablets of Fumitoxin into Severn's peanut dome through a single access hatch, which ultimately led to an explosion, and the peanut dome sustained extensive structural damage. The company sued IFC for breach of contract, among other claims. Severn argues that the PAA's consequential damages exclusion does not bar its breach of contract claim for damage to its dome and peanuts and its associated remediation and lost business costs. Do you think the appellate court ultimately agreed or disagreed with Severn? Why or why not? Source: Severn Peanut Co, Inc, et al v. Industrial Fumigant Co. & Rollins, Inc. (2015). Fresh Food Direct, LLC, entered into a lease agreement with Jet Star Realty, LLC. Fresh Food terminated the lease before its term's end, and the parties

disputed the amount of rent that Fresh Food still owed Jet Star. Eventually, the parties reached an agreement and signed a settlement agreement. The settlement agreement stipulated that Fresh Food would pay Jet Star $20,000 in six monthly installments of $3,333.33, due the first of each month beginning November 2016. The settlement agreement contained a provision that if a payment was not received by the fifth business day of the month, Jet Star's attorneys were required to notify Fresh Food that it was in default. If Fresh Food did not cure the default within 10 days after the notice was sent, Jet Star had the right to enter a judgment of $25,000 minus any payments already made. Fresh Food's final payment was due on April 1, 2017. On April 11, 2017, Jet Star's attorneys wrote Fresh Food informing Fresh Food it was in default. This notice was followed up with an email on April 18, 2017, and April 26, 2017, the latter of which threatened to commence default proceedings. Fresh Food made its final payment on May 5, 2017. According to Jet Star, it prepared a motion for entry of judgment on May 4, 2017, and mailed it to Fresh Food the same day. Fresh Food claims that it did not receive the motion until May 8, three days after it made the final payment. In its motion, Jet Star requested the court to enter a judgment in the amount of the final payment plus $5,000. The trial court denied the motion, and Jet Star appealed. Is the provision in the agreement an enforceable liquidated damages clause? Why or why not? Source: Jet Star Realty, LLC v. Fresh Food Direct, LLC, A-4392-16T1 (N.J. Super. Ct. App. Div. 2018). Texas Inpatient Consultants, LLLP, is a partnership that employs physicians to deliver medical care to hospitalized patients of other physicians. Texas Inpatient recruited Julius Tabe, M.D., to work for it in May 2014. Tabe signed an employment agreement with Texas Inpatient. The agreement did not include a starting date for Tabe's employment. Instead, it stated that Texas Inpatient "will commence payment of salary/benefits only after the credentialing at all the facilities and orientation is completed and the supervising MDs believe that the employee is ready for commencement of duties." The agreement stated that this process could take 90 to 120 days, and therefore the contract date will be redacted to reflect the start date of Tabe's duties. After signing the agreement, a change in family circumstances led Tabe to decide that he could not work for Texas Inpatient. In August 2014, Tabe wrote Texas Inpatient's office manager to inform her that he was withdrawing his candidacy for the position. The office manager replied and noted that two of the four hospitals had successfully completed his credentialing and that Texas Inpatient expected him to start work on October 13. Tabe reaffirmed his decision to withdraw. Page 329 The agreement contained a liquidated damages clause that held, "Should Employee voluntarily terminate or the

Employer terminates his/her employment . . . within one year of executing this Agreement, Employee agrees to pay the employer . . . liquidated damages.” As formulated by the agreement’s terms, Texas Inpatient claimed that Tabe owed it $34,000. Tabe refused to pay, and Texas Inpatient filed suit. Read the language of the agreement carefully. Had all conditions precedent been satisfied, and was Tabe therefore bound by the agreement? Why or why not? How did the court rule? Source: Tabe v. Texas Inpatient Consultants, LLLP, 555 S.W.3d 382 (Tex. App. 2018) The two companies had an agreement by which Sunrish was providing a food product to Nutrisoya. However, Sunrich allegedly did not deliver the products covered in the contract, and Nutrisoya took the company to court for material breach of contract. The seller wanted the district court to instruct the jury on the difference between a breach of a single installment and a breach of an entire installment contract, arguing that a single installment breach did not disregard the value of the whole contract. However, the district court did not give such an instruction and left the defendant to argue the point. How do you think the jury decided? Source: Nutrisoya v. Sunrich, 641 F.3d 282; 2011 U.S. App. LEXIS 11561. Environs Inc. is an architectural firm that designs commercial and business buildings. SAMS Hotel Group LLC signed a contract with Environs, under which Environs would provide architectural services for the design of a six-story hotel in Fort Wayne, Indiana, that SAMS planned to build. The contract contained a liquidated-damages clause that limited Environs’s liability for breach of contract to $70,000. When the building was almost complete, serious structural defects were discovered, the building department condemned the building, and it had to be destroyed. SAMS sued Environs, alleging they breached the contract by providing negligent architectural services, and seeking to recover $4.2 million in damages. The district court found that Environs had indeed been negligent and breached their contract, but because of the liquidated-damages clause, awarded the plaintiff only $70,000. SAMS appealed. How do you believe the appellate court ruled and why? Source: SAMS Hotel Group LLC, Inc. v. Environs, 716 F.3d 432, 2013 US App. LEXIS 11047 (2013). Defendant Practice approached the Hospital about its desire to employ Dr. Rasheed and asked the Hospital to help facilitate his recruitment. The three entered into an agreement that Dr. Rasheed would relocate his practice and practice medicine in Jackson on a full-time basis for 36 months. Under the agreement, “[a]ny material breach of this Agreement by Physician and/or Practice, or a failure by Physician and/or Practice to fulfill any material provisions of this Agreement shall entitle Hospital, at its option, to terminate this Agreement immediately.” The Practice agreed to be jointly and severally liable for any amounts owed to the

Hospital in the event of any breach by the Practice or Dr. Rasheed. The agreement guaranteed Dr. Rasheed a monthly cash collection of $23,350.00 for the first year. The Hospital advanced $180,187.43, to the Practice and Dr. Rasheed as cash collections guarantee payments during the 12-month guarantee period, an amount that the Practice and Dr. Rasheed were jointly and severally liable to repay at the end of the guarantee period. The agreement provided that the debt would be completely or partially forgiven if Dr. Rasheed continued to practice full-time in Jackson for two years at the end of the guarantee period, but if he failed to continue practicing for that time period, he or the practice would immediately reimburse the hospital the amount advanced. Less than one year into the agreement period, Dr. Rasheed stopped his full-time medical practice in Jackson, so the hospital requested reimbursements of the advanced payments pursuant to the terms of the agreement. The Practice did not respond to the Hospital's demand for payment. The hospital then sued the Practice for breach of contract, seeking to recover the amount owed under the agreement. The Practice answered that the doctor's actions were the cause of the breach, and therefore he alone was liable, not the Practice. Following discovery, the Hospital filed a motion for summary. In its response, the Practice stated that Dr. Rasheed left the area after being named as the subject of sexual misconduct allegations involving the staff and child patients, for which he was being pursued civilly and criminally. Therefore, it was impossible for Dr. Rasheed to practice and impossible for the Practice to allow him to continue practicing. Because there was an issue as to whether Dr. Rasheed had the ability to perform under the agreement, the Practice argued that summary judgment was inappropriate. The court granted the Practice's motion and the hospital appealed. How do think the appellate court decided the case and why? Source: Jackson Hosp. Corp. v. United Clinics of Ky., LLC, 545 S.W.3d 327 (2018). Page 330 Plaintiff, a tenant in common in a piece of real property, had agreed to sell his interest therein to defendant, the other tenant in common. The contract of sale provided that defendant was to pay plaintiff $25,000 upon the execution of a bargain and sale deed transferring title to the defendant as the sole owner of the real property. The contract of sale further provided that plaintiff could continue to store his equipment at the property "for a maximum of 60 days from the date" of the contract of sale, and that "[i]mmediately upon the permanent removal of all of the equipment from the premises, Evelyn A. Cuggino shall pay the sum of ten thousand ($10,000.00) dollars . . . to Peter J. Magnani, which shall occur no later than 60 days from the date of this agreement." At a nonjury trial, the evidence established that plaintiff had not removed his equipment within the 60-day period, yet defendant paid plaintiff

the sum of $2,000 prior to plaintiff’s removal of the equipment, but not the remaining $8,000. Plaintiff sued to recover $8,000 for breach of a contract for the sale of real property. The trial court dismissed plaintiff’s action. The court found that plaintiff was not entitled to recover the remaining $8,000 due under the agreement, since removal of the equipment within the 60-day period was a condition precedent to plaintiff’s entitlement to be paid the sum of $10,000 by defendant. Plaintiff appealed this dismissal, claiming the contract of sale did not provide for a forfeiture of plaintiff’s right to recover the $10,000 if he failed to remove the equipment within the 60-day period, and therefore it was not a condition precedent. How do you think the case was resolved on appeal? Why? Source: Magnani v. Cuggino, 57 Misc.3d. 1; 2017 WL 2380647.

Part 3 Domestic and International Sales Law CHAPTER 15 Formation and Performance of Sales and Lease Contracts Page 331 CASE OPENER “I’ll huff and I’ll puff and I’ll blow your house down.” Plaintiff Mike M. and his family bought a mobile home from Lakeview Mobile Homes. A catastrophic windstorm completely destroyed the home. Fortunately, no one was injured as Mike’s family had not physically moved into the home yet. The plaintiff is suing Lakeview for the return of the purchase price. The salesman for Lakeview had assured Mike that the purchase included set up, leveling, and other required activities to make the home secure on its lot. Mike’s wife and other family members had moved some kitchen items into the home and cleaned the home before Lakeview had finished all the setup requirements. Also, Mike’s spouse discovered a number of items in the home needing repair before moving in. Prior to the finishing of the setup and prior to the family moving in, the windstorm completely destroyed the home. This case presents a number of factual and legal questions. Is the sale of mobile home which is to be affixed to the ground a sale of a good under UCC. Article 2? Or is it realty? See this chapter’s Point/Counter Point for another view of this question. Had the mobile home been accepted by the buyers by moving personal items into the home and by cleaning it? Does that determination shift the risk of loss? Has there been no acceptance yet since the setup had not been completed? Who is responsible for the economic loss of the home due to the windstorm? These questions encompass the questions arising out of a sale of a good and whether common law or the UCC apply? Moses v. Newman 658 S.W.2d 119 (1983) (Tennessee Court of Appeals) Page 332 LEARNING OBJECTIVES LO 15-1 Identify the kinds of contracts that fall under UCC interpretations. LO 15-2 Recall how sales contracts are formed under the

UCC. LO 15-3 Define what a merchant is, and why the designation matters. LO 15-4 Describe the characteristics of a lease contract. LO 15-5 Outline the focus and purpose of The United Nations Convention on Contracts for the International Sale of Goods (CISG). LO 15-6 Describe the concept of title, and how title passes. LO 15-7 Explain risk of loss. Businesses and organizations that purchase products need to be aware of which laws govern their purchases because the laws can differ. Three sources of laws that interpret sales contracts exist: state common law, the Uniform Commercial Code, and state statutory law. There is very little, if any, federal law that governs contracts for the buying and selling of items, and when such law does exist, it is highly specialized (e.g., the buying and selling of stock under laws created by the Securities and Exchange Commission). This chapter introduces the Uniform Commercial Code. It explains the scope and significance of the UCC, discusses sections of the UCC that govern both sales and lease contracts, and reviews how these contracts are formed and executed.

The Uniform Commercial Code The Scope of the UCC In some areas of law, federal statutes ensure that the same law applies in all the states. Federal statutes do not govern the formation of sales and lease contracts. Instead, each state passes its own laws to outline rules in this area. Consequently, laws vary from state to state. Although all states (except Louisiana) follow the English common law, over 200 years of legal precedent that has developed in each state can create differences in contract interpretation and application. With the development of interstate commercial activities, these differences began to pose problems for parties from different states entering into a contract with each other. What was needed was some kind of uniform law for business transactions that all the states could adopt. The Uniform Commercial Code (UCC) was created in 1952 and has been adopted in part by all 50 states, the District of Columbia, and the Virgin Islands. Louisiana, not having the English common law heritage, has adopted only portions of the UCC that do not conflict with its historically French-based code law. When a state adopts the UCC, that code becomes part of the law of that particular state; it becomes the commercial code for that state. The UCC is divided into sections known as articles. These articles cover a wide range of topics, from sales contracts to secured transactions (see Exhibit 15-1). Exhibit 15-1An Outline of the UCC ARTICLE TOPIC 1 General provisions 2 Sales 2(A) Leases 3 Negotiable instruments 4 Bank deposits and collections 4(A) Wire transfers 5 Letters of credit 6 Bulk transfers 7 Documents of title 8 Investment securities

9 Secured transactions The Significance of the UCC The UCC is significant because it clarifies sales law and makes this area of law more predictable to businesses that engage in transactions in more than one state. Essentially, the UCC facilitates commercial transactions. This is an important point to remember. When in doubt, judges will try to interpret the UCC to keep an agreement in force. As the drafters of the UCC intended, the UCC is designed to facilitate commercial transactions, not construct ways to impede them. Page 333 However, it is important to emphasize that the UCC does not pertain to all business transactions. Under UCC Article 2, the subject matter of this chapter, the UCC explains the creation and interpretation of sales contracts.

Articles 2 and 2(A) of the UCC LO 15-1 Identify the kinds of contracts that fall under UCC interpretations. Article 2 of the UCC governs sales contracts; Article 2(A) governs lease contracts.1 Specifically, Article 2 focuses on contracts for the sale of goods; Article 2(A) focuses on contracts for the lease of goods. For the purpose of selling something, the UCC divides all the items that can be bought and sold into three categories: goods, realty, and services (including intangible goods such as securities). Article 2 pertains only to the sale of goods. Nonetheless, Article 2 is not a comprehensive guide to sales contract formation. When Article 2 is silent on an issue of sales contract formation or interpretation, the common law rules apply. Of course, if a state has passed statutory law regarding contracts, that law always supersedes the common law. Additionally, it is important to note that under the UCC, the rules for transactions involving merchants differ from those for transactions involving regular buyers and sellers. Merchants will generally be held to a higher standard of care and behavior than non-merchants. Every state except Louisiana has adopted Article 2 of the UCC.2 If you are not sure whether a contract falls under common law or under the UCC, the decision tree in Exhibit 15-2 can help you make a determination. To use this rubric, consider the following definitions of many of its terms. Exhibit 15-2Common Law or UCC? Does the transaction involve a sale or lease (as opposed to, let’s say, a gift)? If yes → go to question 2. If no → apply the appropriate area of common or statutory law. Is the transaction for the sale or lease of a good? If yes → go to question 3. If no → apply common law. If the contract is for the sale or lease of both goods and nongoods, which type of item is predominant in the contract? If goods → UCC Article 2 applies; go to question

4. If nongoods (real estate or services) → common law applies. If this is a UCC Article 2 transaction, is either party a merchant? If yes → pay close attention to when the special rules on merchants apply. If no → then only “reasonable” care applies to the parties. From the UCC’s perspective, everything that can be bought and sold falls into three categories: goods, services, and realty. Think of it this way: Article 2 of the UCC LO 15-2 Recall how sales contracts are formed under the UCC. Sale Section 2-106(1) of the UCC states that a sale “consists of the passing of title from the seller to the buyer for a price.” Page 334 Goods Section 2-105 of the UCC defines goods as “all [tangible] things which are movable at the time of identification to the contract for sale.” Items are tangible if they exist physically. In the case opener, clearly “cars” would be tangible and moveable items thus qualifying as goods. Would a contract for the purchase of automobiles before the cars are assembled qualify as a contract for the sale of goods. It is only when the goods are identified to the contract that the contract springs into existence. In the case opener, that would be when the mobile home itself is identified specifically to the contract. Some items are not goods under Article 2. For example, corporate stocks and copyrights are not tangible, so they are not goods. Real estate cannot be moved, so it is not a good. Yet items attached to real estate that are used for business activities are known as trade fixtures and are treated as goods under the UCC. Page 335 Items taken from real estate may be treated as goods. Minerals, clay, and soil can all be treated as goods, with their sales contract governed by Article 2, if the owner takes these items out of the ground and then sells them to the buyer. If the owner sells the buyer the right to come and remove the items, the contract would be governed not by the UCC but by common law for the sale of an interest in realty, in this case, an interest known as a profit. Crops that are sold while still growing in the field are also considered goods, and their sales contracts are subject to UCC interpretation. Exhibit 15-3 gives a synopsis of these issues. Exhibit 15-3What Is a Good? ITEM A “GOOD” FOR UCC/CISG PURPOSES NOT A “GOOD”; COMMON LAW CONTRACT RULES APPLY Grains in the field X Items attached to real estate and meant to be permanent (swimming pool anchored in the ground) X Items attached to business realty (shelving, for example) X Minerals, clay, shale, oil, etc., if removed by owner of land X Mineral, clay, shale, oil, etc., if removed by buyer X BUT WHAT IF. . . WHAT IF THE FACTS OF THE CASE OPENER WERE DIFFERENT? What if the mobile home sales contract had indicated that risk of loss transferred with title? Would the plaintiff then be liable for the loss from the windstorm. Explore this chapter to see how the passing of title and the risk of loss are actually separate elements of a UCC Sales Contract. Consider the following

Case Nugget. Could or should the Petersons have done anything as soon as they found the problem stalks? Is the loss caused by the storm or by the genetic composition? Who has this risk of loss? Are the seeds the goods, is the corn the goods, or is this even a UCC contract? CASE Nugget Peterson v. North American Plant Breeders 218 Neb. 258, 354 N.W.2d 625 (1984) In spring 1981, Robert and William Peterson bought Migro Seed Company Inc. corn seeds from John Sandall. Both Petersons were local farmers, and John Sandall, also a farmer, was Migro's area dealer. Migro produces hybrid seeds for sale, and the corn seeds the Petersons bought were a "product of scientific genetic cross-breeding to produce a seed having desirable germination, growing, and production qualities." Around July 23, 1981, the Petersons discovered that nearly 70 percent of their corn grown from the Migro seeds had broken off at the ear level after a typical Nebraskan thunderstorm the evening before. However, corn growing from non-Migro seeds had not suffered such damage. It turns out that these plants had absorbed silica in the sandy soil in this particular area of Nebraska, causing them to develop a brittle stalk and thus break at about the first ear-of-corn level. No other variety of corn seed had this problem. When John Sandall, the neighboring farmer and Migro dealer, sold the Petersons the 102 bags of seed, the literature accompanying the seed indicated that one of the Migro seed's attributes was excellent stalk quality. When the crop was harvested, the Petersons harvested approximately 19½ bushels per acre of the Migro corn while averaging 113¾ bushels per acre of corn grown from seed provided by other seed companies. The Petersons brought a lawsuit for breach of contract. Page 336 Mixed Goods and Services Contracts Sometimes, it is not easy to tell whether something is a good because a tangible item is tied to or mixed with something intangible, such as a service. A contract that combines a good with a service is a mixed sale. Article 2 applies to mixed sales if the goods are the predominant part of the transaction. LO 15-3 Define what a merchant is, and why the designation matters. Merchants UCC Article 2 pertains to anyone buying and selling goods. However, the UCC distinguishes merchants from regular buyers and sellers; it contains provisions that either apply only to merchants or impose greater duties on merchants. The drafters of the UCC assumed that merchants have a greater ability to look out for themselves than do ordinary buyers and sellers. The definition in the margin can be used to determine whether a seller or a buyer is a merchant under the UCC. Consider the facts in the preceding Case Nugget. Think of questions about merchants as they relate to the transaction between the Petersons, Migro Seed Company, and John Sandall. Specifically, can any part of UCC Section 2-104(1) be used to

argue that John Sandall is a merchant? What about the Petersons? Also, consider the possibility that if the Petersons are merchants, a court will assume that they need less protection than they would if they were nonmerchant buyers of the seeds. There is no question that Migro Seed Company is a merchant. However, if the Petersons sue John Sandall as well, is he a merchant and thus subject to a higher standard of care? If the Petersons are merchants, then as merchants in the business of farming, should they have known that their sandy soil, rich in silica, could pose a problem? E-Commerce and the Law The UCC and the Internet The Uniform Commercial Code was designed to address the sale of tangible goods such as scooters, electric power tools, and jeans. Because the UCC was written long before the Internet and e-commerce boom, this legislation was not designed for transactions related to less tangible things, such as software and information. Not surprisingly, the UCC does not respond well to certain legal issues that arise in today's marketplace. For example, the UCC does not tell us the answers to these questions: What rules should govern computer software, which is likely to be licensed rather than sold as a good? What about downloadable software files? What rules should govern information providers like Google or MSN which provide a continuing service? What rules should govern the exchange of information, such as stock quotes? What rules cover travel reservations a person makes online? The National Conference of Commissioners on Uniform State Laws (NCCUSL) has adopted the Uniform Commercial Information Transactions Act (UCITA), which answers the preceding questions and many more. This law promises to do for electronic contracting what the UCC did for transactions in physical goods: protect consumers by providing predictability, uniformity, and clear rules. As with the UCC, states will choose whether to adopt UCITA. In 2001, Virginia became the first state to enact UCITA, probably because major Internet-related companies (i.e., AOL, UUNET Technologies) are headquartered in northern Virginia. Sources: Robert Holleyman, "Updating Contract Law for the Digital Age," USA Today, March 1, 2000 (2000 WL 9014770); Scott W. Burt, "Controversial New Rules for Computer Contracts," Metropolitan Corporate Counsel 8 (June 2000), col. 1. Article 2(A) of the UCC Article 2(A) covers contracts for the lease of goods. This section of the UCC is increasingly important because consumers (both individuals and businesses) are more likely to lease goods today than ever before. Consumers lease cars, equipment, and machines. Article 2(A) does not cover leases related to real property. LO 15-4 Describe the characteristics of a lease contract. Leases UCC Section 2A-103(j) defines a lease as "a transfer of the right to possession and use of goods for a term in return for consideration." A lessor

is “a person who transfers the right to possession and use of goods under a lease.”3 A lessee is “a person who acquires the right to possession and use of goods under a lease.”4 Thus, if you lease a car, the company that leases the car to you (the lessor) transfers the right of possession and use of the car to you (the lessee) in return for consideration (money).

Contracts for the International Sale of Goods LO 15-5 Outline the focus and purpose of The United Nations Convention on Contracts for the International Sale of Goods (CISG). The Scope and Significance of the CISG By the 1970s, it became clear that, increasingly, businesses planned to conduct commercial transactions not only across state lines but also across country borders. In 1980, the United Nations Convention on Contracts for the International Sale of Goods (CISG) was offered as a treaty that countries could sign, indicating their willingness to allow this treaty to govern international business-to-business sales contracts. The CISG is important because if a problem arises with an international sale and a party to the transaction initiates litigation, the UCC does not provide guidance in the litigation; instead, the CISG preempts the UCC. The CISG covers the same general topics as the UCC. For instance, the CISG covers offers, acceptances, and other contract topics. There are some fundamental and subtle differences between the UCC and the CISG. It seems that the CISG tends to be “friendlier” to the seller, but that determination will be fact-specific on the circumstances of the situation presented. Specific provisions of the CISG differ from the UCC as illustrated by Exhibit 15-4. Exhibit 15-4UCC vs. CISG UCC CISG Applies to consumer and commercial contracts for the sale of goods Consumer contracts are not covered by the CISG Statute of frauds writing requirement for sale of goods over $500 No writing requirement necessary in order to prove contract Parties may agree on open terms in price and even specific quantity and still create an enforceable contract Specificity is required Parol evidence rule is strictly applied Parol evidence is admissible to show party’s intent even if contradictory to written documentation Revocation of an offer is valid up to acceptance Revocation of an offer is only possible if there has been no reliance, regardless of the status of the acceptance Battle of the forms impliedly ratify changes presented in the contract No battle of the forms is binding if material terms of the agreement are altered Perfect tender is required or a breach occurs Breaching party has the right to cure so long as the cure is done within a

“reasonable” time Specific warranty disclaimers are required to negate merchantability No such disclaimer Lost profit may or may not be included in consequential damages Damages nearly always include lost profit No such provision in the UCC If goods suffer a decrease in value, buyer may reduce purchase price accordingly See the Point/Counterpoint at the end of this chapter for the significant question whether the United States should adopt the CISG.

How Sales and Lease Contracts Are Formed under the UCC Earlier in this textbook, you studied the common law of contracts, from the rules for agreements to the remedies for breaches. Sales and lease contracts require the same components as general contracts, but some UCC provisions that govern contracts for the sale or lease of goods are not identical to the common law requirements you learned about in Part 2. This section highlights the most important provisions of the UCC with regard to the formation of sales and lease contracts. Differences between the UCC and the CISG will be noted. Formation in General Under both the UCC and the CISG, contracts for the sale or lease of goods may be made in any manner sufficient to show agreement.5 A court will uphold a contract for the sale or lease of goods as long as the parties intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.6 Offer and Acceptance Offer Under the UCC, if certain contract terms are left open, it is acceptable to fill them in. Exhibit 15-5 indicates what generally happens under the UCC when certain terms of a contract or lease are left open. Although the quantity element is usually required, since without it the courts will have no guideline to determine the intent of the parties, the UCC does permit “output” and “requirement” terminology to determine quantity. If a farmer agrees to sell all the grain their fields will produce but is unable to determine a specific amount, then “quantity” has been satisfied under the UCC as an output contract. Conversely, if a buyer agrees to buy all of their “requirements” for a certain good but is unable to identify an exact amount, then the UCC recognizes this as an enforceable requirements contract. See the following Case Nugget for an interesting example of this. Exhibit 15-5The UCC and Open Terms TERM LEFT OPEN INTERPRETATION UNDER UCC Price A “reasonable price” is supplied at the time of delivery. Payment Payment is due at the time and place at which the buyer is to receive the goods. Delivery The place for delivery is the seller’s place of business. Time The

contract must be performed within a reasonable time. Duration The party that wants to terminate an ongoing contract must use good faith and give reasonable notification. Quantity Courts generally have no basis for determining a remedy. CASE Nugget PMC Corporation v. Houston Wire & Cable Company Supreme Court of New Hampshire 147 N.H. 685; 797 A.2d 125; 2002 N.H. LEXIS 68; 47 U.C.C. Rep. Serv. 2d (Callaghan) 1427 (2002) PMC sells thermocouple wire. Houston entered into an agreement to buy a substantial or “major portion” of its wire from PMC. In the middle of the contract period, Houston informed PMC that it would still purchase wire from PMC but that the “bulk” of its purchase would be made through a competitor of PMC. PMC brought suit for breach of contract. The court refused the defendant’s motion for summary judgment, and then the defendant appealed. The reviewing court found that there was sufficient evidence to find that the quantity element was sufficient for the contract to be enforceable under the statute of frauds. The writing expressed a quantity term when the distributor stated that it intended to purchase a major portion of the product from the supplier. This term was sufficient to afford a basis for believing that the offered evidence rested on a real transaction. There was sufficient evidence to determine the terms reasonably, including the quantity of the contract. The reviewing court found that the agreement contained language from which a jury could have determined that the distributor agreed to purchase exclusively from the supplier up to a certain quantity. Page 339 The UCC also creates a new category of offers: the firm offer. Under UCC Section 2-205, offers made by merchants are considered firm offers if the offer (1) is made in writing and (2) gives assurances that it will be irrevocable for up to three months despite a lack of consideration for the irrevocability. If a firm offer is silent regarding time, the UCC assumes a three-month irrevocability period. This contrasts sharply with the common law, under which an offer is revocable at any time prior to acceptance unless a period of irrevocability (also known as an option) is supported by some kind of consideration. Acceptance Under the UCC, an acceptance may be made by any reasonable means of communication, and it is effective when dispatched.7 It is important to note that the mirror-image rule that applies under common law does not apply under the UCC. Recall that the mirror-image rule states that an offeree’s acceptance must be on the exact terms of the offer. If the acceptance includes additional terms, the acceptance becomes a counteroffer instead of an acceptance. GLOBAL Context Digital Archive Japan/Alamy E-Commerce Sales in the Middle East The Middle East seems to provide a potentially fertile ground for e-business start-ups. Why? Just one country, the United Arab Emirates (UAE), is a huge source of buyers

interested in purchasing online. Commentator Dan Stuart notes that Eighty percent of respondents have a credit card; 70% of respondents use their credit card for online purchases; 40% of respondents buy online once per month or more; 56% of respondents are somewhat to very comfortable buying online from Europe, 59% from North America, but with the largest group of respondents from the GCC and Levant saying that buying from this region just hasn’t even been an option; 49% of respondents cite the chief reason for hesitation or lack of online shopping from this region is the lack of options. However, the fly in the ointment is the costs of the available payment providers. Consider that in North America, the requirements for setting up an e-commerce payment provider (such as PayPal) are $0 of collateral on account as a deposit with the merchant account provider, $199 setup fee, $420 yearly maintenance fee, and 2.6 percent and $0.25 on every transaction. In contrast, in the Middle East, these innocuous costs jump to $85,000 of collateral on account as a deposit with the merchant account provider (subtract from your operating capital), $1,000 setup fee, $5,000 yearly maintenance fee, and 3 percent on every transaction. Source: Dan Stuart, “The State and Opportunity for E-commerce in the Middle East,” danstuart.me, February 24, 2010. Under the UCC, additional terms are permitted in contracts for the sale or lease of goods. Under UCC Section 2-207(1), additional terms do not negate acceptance unless acceptance is made expressly conditional on assent to the additional terms. Consideration Sales and lease contracts require consideration. Under the common law, when a contract is modified, it must be supported by new consideration. The UCC eliminates that requirement for the modification of sales and lease contracts.8 The UCC requires only that modifications must be made in good faith.9 Battle of the Forms When parties are negotiating and offers and counteroffers are being exchanged, the UCC recognizes something we call the battle of the forms. Essentially, it works like this: If the last set of negotiations is not specifically rejected, then the last terms standing, so to speak, are the ones that are applicable to the final transaction. The CISG tends to be less lenient with the battle of the forms and relies more on the old common law mirror-image rule; that is, if the parties did not expressly agree to certain terms, then those terms cannot be assumed. The UCC, focusing on its predisposition to facilitate commercial transactions, assumes that the terms found in the battle of the forms are part of the contract whether expressly agreed to or not. Page 340 Requirements under the Statute of Frauds Under common law, the statute of frauds requires all material terms to a contract to be in writing. Under the UCC, contracts for the sale of goods must be in writing if the goods are priced at $500 or more;

lease contracts that require payments of $1,000 or more must be in writing to be enforceable.10, 11 There is a significant difference between the statute of frauds and the UCC about what constitutes a writing that satisfies the statute. Common law requires some kind of writing created or signed by the party who is contesting the enforceability of the contract. This rule holds true under the UCC unless the parties are merchants. If two merchants have an oral agreement, a written memo from either party to the other is deemed to satisfy the statute of frauds, even if it is not acknowledged by the receiving party. If the memo is not objected to within 10 days of receipt, the oral agreement, memorialized by the memo, is binding. The CISG has eliminated the statute of frauds. The CISG requires only credible and reasonable proof that a contract exists, regardless of whether the proof is documented or verbal. Unconscionability A contract or contract provision is unconscionable if it is so unfair that a court would be unreasonable if it enforced the contract. The UCC outlines actions a court can take if it discovers that a contract or lease provision or the contract or lease as a whole is unconscionable.12 If a court finds that a contract or lease was unconscionable, in whole or in part, when it was made, the court can either refuse to enforce the contract or lease or enforce the parts that are fair. In other aspects of contract formation, Common Law prevails when Articles 2 and 2(a) are silent. Essentially, the common law interpretations of unconscionability apply. The same is true when undue influence, fraud, mistake, innocent misrepresentation, and coercion is present. Consider the following case where the court must decide if there is a mutual mistake in the contract formation, thus negating either the contract or the offending clause, or if there is a breach of contract. Page 341 CASE 15-1 Larson v. Burton Constr., Inc. 2018 WY 74 (2018) FACTS: In December 2015, Ken Burton, on behalf of Burton Construction, Inc., and Mr. Larson entered into a written contract (the Contract) in which Mr. Larson agreed to purchase from Burton a 2015 Skyline mobile home for $43,000. The Contract was a “form” contract, consisting of boilerplate provisions and blank lines on which parties could enter information. Mr. Larson’s agent completed the form by hand, obtained Mr. Larson’s signature, and delivered the document to Burton with $500 in earnest money. Burton went through the Contract carefully, made a few minor changes, and countersigned it. Although the Skyline mobile home was new and the parties intended to convey a new mobile home, the form was designed for the sale of a used mobile home. Thus, the Contract required Burton, as the “Owner” of the mobile home, to execute and deliver a Wyoming title at closing. The contract stated 6. At closing, Owner shall execute and deliver a Wyoming title and Bill of Sale free and clear of all liens

and encumbrances except: all will be free and clear. 7. Title shall be conveyed to the following named purchaser(s): Justin James Larson as Sole Owner. Title and the Bill of Sale shall be executed but escrowed if sold under contract. 8. Title shall be merchantable in the Seller, except as stated in this paragraph. Subject to payment or tender as above provided and compliance with other terms and conditions hereunder by Purchaser, the Seller shall execute and deliver a good and sufficient title in favor of those persons named in Paragraph 7 above, and a good and sufficient Bill of Sale, and deliver the same to said Purchaser at closing, which shall occur on or before January 15, 2016, conveying said personal properties free and clear of all liens and encumbrances, except: (a) Personal property taxes for 2016, which shall be prorated to date of closing; (b) Purchaser shall be responsible for sales tax, if any. Receiving no title at closing, the buyer attempts to revoke the sale and sues for breach of contract. The Seller claims that there is no breach as the custom in Wyoming was to deliver the title at a later time. The seller Burton claimed that despite the Contract's clear language, Burton testified that it was not his custom to deliver a Wyoming title to purchasers of new mobile homes at closing. Accordingly, Burton never intended to deliver a Wyoming title to Mr. Larson at closing because "[t]hat's not how you do it." Mr. Larson, as the second titleholder, would be deprived of the warranty. ISSUE: Is this Mutual Mistake or Breach of Contract? Burton brought suit in circuit court for breach of contract, seeking either specific performance or damages, as well as attorney fees and costs. After a bench trial, the circuit court found that the parties made a mutual mistake, canceled the Contract, and ordered Burton to return Mr. Larson's earnest money. On appeal, the district court reversed, ruling that the circuit court erroneously applied the doctrine of mutual mistake, that it was "factually unknown" whether Burton delivered a Wyoming title at closing, and that Mr. Larson breached the Contract when he refused to attend closing and to pay sales tax. Pursuant to W.R.A.P. 13, we granted Mr. Larson's petition for writ of review COURT'S RATIONALE: There is no reason to venture beyond the four corners of the Contract to determine that Burton was required to deliver a Wyoming title at closing. The parties argued, and both lower courts found, that the Contract's language is unambiguous, and we agree. The Contract states that closing must occur by January 15, 2016, at which time Burton must deliver a Wyoming title: "At closing, Owner shall execute and deliver a Wyoming title and Bill of Sale free and clear of all liens and encumbrances." We will construe contract language "in the context in which it was written, looking to the surrounding circumstances, the subject matter, and the purpose of the agreement to ascertain the intent of the parties at the time

the agreement was made.” However, we will not “rewrite contracts under the guise of interpretation, and so long as there is no ambiguity, we are bound to apply contracts as they have been scrivened.” “[C]ourts apply an objective theory of intent whereby one party’s intention is deemed to be that meaning a reasonable person in the position of the other contracting party would ascribe to the first party’s manifestations of assent.” A reasonable layperson, such as Mr. Larson, would not be privy to a dealer’s process of transferring title. Further, although parties to a contract are presumed to know the law, we do not attribute to them a complete understanding of the statutes governing sales of mobile homes. “According to our established standards for interpretation of contracts, the words used in the contract are afforded the plain meaning that a reasonable person would give to them.” HOLDING: We affirm the district court’s reversal of the circuit court’s finding of a mutual mistake of the parties. We reverse the district court’s decision to hold Mr. Larson in breach of the Contract and conversely find that Burton breached the Contract. We remand for further proceedings consistent with this opinion. SIGNIFICANCE: The courts give great deference to the literal language of the contract and will avoid any reformation of the parties’ intentions. CRITICAL THINKING Think about the concept of breach of contract which you will be studying in the next chapter. But, as this case illustrates and which is expanded in the Ethical Decision Making box below, does “intention” of the parties impact a court’s consideration of breach. ETHICAL DECISION MAKING It is fairly clear here from the facts that neither party deliberately attempted to breach the contract. It seems to be honest mistakes about what the standard practice and procedures were in the physical transferring of title in Wyoming. Why do you think the court was relatively harsh in its ruling? Or was the court harsh at all? Consider the Practical Tips for Business Managers below when formulating your response.

Title Once the sales contract has been created and the parties are obligated to perform, the next issue to consider is the concept of title. Title means ownership. The most important aspect of title is that a person must have title to pass title. In other words, you can’t sell something that you don’t own. Moreover, you can’t give it away or use it as collateral for a loan. So what does it mean to have title? Three Kinds of Title There are three kinds of title: good title, void title, and voidable title. First, good title is title that is acquired from someone who already owns the goods free and clear. Next, void title is

not true title. Someone who purchases stolen goods, knowingly or unknowingly, has void title. Finally, voidable title occurs in certain situations in which the contract between the original parties would be void but the goods have already been sold to a third party. The next few sections of the chapter discuss these types of title in detail.

Acquiring Good Title LO 15-6 Describe the concept of title, and how title passes. The most obvious way of attaining good title is acquiring it from someone who has good title, that is, the person who owns it free and clear, without any qualifications. In contrast, someone who has come into possession of stolen goods never has good title and can never pass a good title. A person in possession of stolen goods has void title. However, problems may arise when someone thinks he or she has good title but actually has void title. Consider Case 15-2, which concerns the sale of a stolen vehicle and whether a car dealership's title was voidable or void. Page 343 CASE 15-2 ALFONSO CANDELA, APPELLANT, v. PORT MOTORS INC., RESPONDENT, ET AL. Defendant Supreme Court of New York, Appellate Division, Second Department 208 A.D.2d 486; 617 N.Y.S.2d 49 (1994) FACTS: Candela purchased a car for approximately $19,000 from Port Motors Inc. The police later seized the car, claiming that it may have been stolen. Candela brought suit against Port Motors for breach of warranty of title. Port Motors's defense was that it indeed passed a good title to Candela. New York's Supreme Court, which is New York's trial court level, granted Port Motors' motion for summary judgment, agreeing with Port that the car dealer had voidable title. The case went up on appeal and considered the issue of whether good title can ever pass for stolen goods. ISSUE: Can a good-faith seller of stolen goods pass a voidable or even good title to a good-faith innocent buyer? REASONING: In a word, no. Good faith and innocence have no bearing whatsoever on this matter. Someone who sells stolen goods, regardless of the degree of good faith, can never pass a voidable or good title to the buyer. The buyer has a void title, and therefore the rightful owner can reclaim the goods. DECISION AND REMEDY: The court of appeals held that the only remedy is that, if the buyer did not receive a good title to the goods from the seller, the buyer could sue the seller for the money paid. SIGNIFICANCE OF THE CASE: The significance of the decision is that if Port Motors purchased the vehicle from a thief, or from the successor to a thief, Port Motors' title would be void and Port Motors could not have conveyed

good title to Candela. CRITICAL THINKING The appellate court reversed the trial court’s decision, which had granted a summary judgment to Port Motors. Candela will have the opportunity to have a court rule on whether Port Motors passed good title to him. What key facts will determine whether the title was void or voidable? ETHICAL DECISION MAKING Why would Port Motors Inc. fight Candela in court? Shouldn’t the car dealer want to make its customers happy? What ethical norm must be underlying Port Motors’ behavior in contesting Candela’s claim? The key point to remember, which many people misunderstand, is that good faith is actually irrelevant when passing a void title. If a person has a void title (as in the best, and most frequent, example: a person has possession of stolen goods), then no matter how honorable the intentions of the seller are, that good-faith seller cannot pass anything to the buyer but another void title. The only exception to this is the entrustment situation, which is discussed later in the chapter. Voidable Title When a seller transfers goods to a buyer, normally the buyer gets good title. However, the buyer gets only voidable title if any of the following apply: The buyer deceived the seller regarding his or her true identity. The buyer wrote a bad check for the goods. The buyer committed criminal fraud in securing the goods. The buyer and seller agreed that title would not pass until some later time. The buyer is a minor. The first four of these situations that can create a voidable title are articulated in Section 2-403 of Article 2 of the UCC; the final one, the buyer is a minor, comes from common law. A seller who discovers any of these situations has the right to cancel the contract and reclaim the goods, even if they have already been delivered to the buyer. That is why the title is called voidable. Page 344 Entrustment If an owner entrusts the possession of goods to a merchant who deals in goods of that kind, the merchant can transfer all rights in the goods to a buyer in the ordinary course of business. One form of entrustment occurs when someone entrusts the possession of a good (e.g., a car) to a merchant and asks him to repair that good. Suppose the merchant fraudulently or accidentally sells the item as if it were part of his inventory. If the purchaser is a good-faith purchaser (i.e., did not know that the item belonged to someone else and paid a fair market value, not some unreasonable discounted value), then that purchaser gets a good title. The original owner’s only recourse is to bring suit against the merchant. Again, the rationale behind this concept is the facilitation of commercial activity regarding good-faith purchasers in the marketplace. In Case 15-3 below characterizes issues with title from one of the most tragic occurrences in human history. CASE 15-3 Frenk v. Solomon 2018 N.Y. Misc. LEXIS 3846 (2018) FACTS: This matter sadly begins with the Nazi Holocaust, “the most tragic event of our time.” This action involves the

art collection of the late Paul Westheim, a Jewish art critic, who specialized in German expressionist art. Among over 3,000 paintings, sculptures, watercolors, drawings, and graphics, Mr. Westheim's collection allegedly included the five artworks at issue in this case: Paul Klee's Opus 18; Otto Mueller's Drei Akte (also known as The Bathers); Max Pechstein's Portrait of Paul Westheim (also known as Portrait of a Standing Man); Edgar Jene's Plastische Imagination; and Erich Heckel's The Violinist (collectively, Five Works). In 1933, Mr. Westheim fled Nazi Germany for Paris and left his collection with Charlotte Weidler, an art dealer in Berlin. During World War II, Mr. Westheim fled from France to Spain, then Portugal. Ultimately, he settled in Mexico in 1941, where he met and was later married to Marianna Westheim-Frenk, plaintiff's mother. He also corresponded extensively, and in code, with Ms. Weidler during the war; however, those "vivid" communications terminated, according to Mr. Westheim, after the war when he inquired as to the whereabouts of his art collection. Indeed, Mr. Westheim's restitution claim, filed in West Germany in the 1950s, was thwarted by an affidavit of Ms. Weidler's sister, who affirmed that Mr. Westheim's entire collection had been destroyed during the war in a bombing; thus, Mr. Westheim was prevented from establishing Nazi persecution as the cause of the loss. In this action, plaintiff asserts that Mr. Westheim's art collection was not destroyed; rather, she alleges that Ms. Weidler stole the collection and began to sell artworks from it soon after Mr. Westheim died. Westheim passed away in 1963, Ms. Weidler passed away in 1983, and Ms. Westheim-Frenk passed away in 2004. 1973 Action and Release In 1973, Ms. Westheim-Frenk learned that Ms. Weidler had sold a painting from Mr. Westheim's collection, Portrait of Dr. Robert Freund, to a gallery in New York City. Ms. Westheim-Frenk commenced an action against Ms. Weidler and others (1973 Action) for damages and for "possession of all items of [Mr. Westheim's] art collection" in Ms. Weidler's custody. (Ms. Westheim-Frenk's 1973 Action unverified complaint, Marianna Westheim v Serge Sabarsky Gallery, Inc. et al., Index No. 16877/1973 [Sup Ct, NY County], NYSCEF Doc. No. 138.) In the 1973 Action, Ms. Westheim-Frenk also sought an account of Ms. Weidler's actions regarding Mr. Westheim's art collection and "whatever sums of money are found to be due . . . on the basis of said account." (Id.) A pre-answer motion to dismiss was served in the 1973 Action, but—before the motion was decided or any discovery was exchanged—the 1973 Action was discontinued "with prejudice" by stipulation, dated March 21, 1974. (See NYSCEF Doc. Nos. 138, 141-142.) Ms. Westheim-Frenk, who was represented by New York counsel, contemporaneously executed a blanket release (Release) discharging Ms.

Weidler and Ms. Weidler's "heirs, executors, administrators, successors and assigns of and from all manner of actions, causes of action, suits, debts, dues, sums of money, accounts, reckoning, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in law, in admiralty, or in equity which against . . . [Ms.] Weidler, [that Ms. Westheim-Frenk] ever had, now have, or which [Ms. Westheim-Frenk] or [her] heirs, executors, or administrators, hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of these presents." The Release specified that it "maynot be changed orally" (id.), and no other documents set forth the terms of the settlement of the 1973 Action. In consideration for the Release, Ms. Westheim-Frenk received $7,500. Ms. Weistheim-Frenk's daughter now brings an action against Ms. Weidler's daughter, Ms. Solomon, and her two sons for the return of the five paintings. ISSUE: What is the validity of documents so old that there is no one living to verify the legitimacy of the papers? REASONING: Here, all parties ask this court to consider documents dating back to the 1930s; for example, to establish that the Five Works belonged to Mr. Westheim, plaintiff relies on two documents Paul Westheim drafted in the 1960s. Defendants' conclusory attack on plaintiff's documents as fraudulent, inaccurate, and invalid is without merit and lacks an admissible factual basis. Notably, in violation of Commercial Division Rule 13, the opinion of defendants' expert (Expert Opinion) is unsigned and undated, except for a translator's certificate of accuracy, dated December 5, 2016; thus, for the purposes of this motion, the court deems the various documents submitted by both parties, and those referenced in the Expert Opinion, to be ancient and admissible. "Under the 'ancient document' rule, a record or document which is found to be more than 30 years of age and which is proven to have come from proper custody and is itself free from any indication of fraud or invalidity 'proves itself.' This rule dispenses with the proof of the execution of a record or document on the proof of its antiquity. It presumes that the entrant of the record or document is dead after the passage of 30 years. If the genuineness of an ancient document is established, it may be received to prove the truth of the facts that it recites." Thus, Mr. Westheim's ownership of the five paintings is established. ISSUE #2 Isn't Ms. Weidler holding of the paintings an entrustment and may pass a good title on to a buyer in the ordinary course of business even when she is not the title-holder? DECISION AND REMEDY: Defendants admitted that, between 1977 and 1983, Ms. Weidler sold, traded, or gave four of the Five Works to defendant Ms. Solomon. Further, Ms.

Solomon admitted that, in 1998, she helped art collector Gour Shoshan sell the fifth artwork, The Violinist. Defendant Yris Rabenou Corporation is listed on the auction's schedule of property as the "OWNER" of The Violinist. Citing the Uniform Commercial Code's Doctrine of Entrustment, defendants argue that Ms. Weidler held the power to transfer good title of the Five Works to defendants. Under this theory, because Mr. Westheim entrusted his art collection to Ms. Weidler, a merchant of art, Ms. Weidler had the power to transfer Mr. Westheim's full interest in the collection to buyers, like defendants, acting in the ordinary course of business. "A defendant's status as a buyer in the ordinary course is an affirmative defense." However, defendants failed to plead this affirmative defense in their answer. In any event, even if defendants had timely raised that defense, Mr. Westheim left the collection with Ms. Weidler when he fled persecution in Nazi Germany; that does not constitute the ordinary, measured entrustment contemplated in the UCC [noting that a "signature at gunpoint cannot lead to a valid conveyance"]. Any conveyances by gift, sale, or otherwise to Ms. Weidler under those circumstances are suspect. The inadmissible opinion of defendants' expert does not establish that Mr. Westheim intended that Ms. Weidler would sell his art collection and send him the proceeds; moreover, the Expert Opinion is based on "decod[ing] the special language that Weidler and Westheim had been using" and necessarily conclusory. The court rejects defendants' entrustment argument. ISSUE #3 Is the release enforceable? DECISION AND REMEDY: Plaintiff argues that the Release does not bar this action because the Release was limited to only the painting, entitled Portrait of Dr. Robert Freund, the sale of which by the New York art gallery caused Ms. Westheim-Frenk to commence the 1973 Action. Plaintiff contends that the Five Works are not covered by the Release, and, even if they are so covered, she argues that a subsequent 1976 transaction constitutes waiver of the Release. Alternatively, plaintiff argues that Ms. Westheim-Frenk was fraudulently induced by Ms. Weidler to execute the Release, and also asserts that defendants should be equitably estopped from using the Release as a shield because plaintiff alleges that Ms. Weidler is a thief. None of plaintiff's allegations, read as a whole and afforded the light most favorable to plaintiff, are sufficient to raise a triable issue of fact as to fraud and fairness at the time of the Release. The alleged fraudulent misrepresentation was precisely the subject of the terminated 1973 Action: whether there were more artworks from Mr. Westheim's collection. "[A] party that releases a fraud claim may later challenge that release as fraudulently induced only if it can identify a separate fraud from the subject of the release." "Were this not the case, no party could ever settle a fraud claim with any finality." Plaintiff also

fails to establish a misrepresentation by Ms. Weidler at the time of the Release. Ms. Westheim-Frenk failed to condition the Release on the truth of the information, if any, that was provided to her—i.e., that there were no other artworks from Mr. Westheim's collection. (See e.g. id. [noting that "plaintiffs were allegedly aware that they lacked a full picture of Conecel's internal finances and that the relationship between the parties had become adversarial, yet they failed to condition the release on the truth of the information supplied by defendants, obtain representations or warranties to that effect, or insist on viewing additional information"].) While Ms. Westheim-Frenk may have been unsophisticated in such matters, she was represented by New York counsel during the 1973 Action and the Release. Moreover, there was no apparent reason to rush to settlement. Finally, although plaintiff also urges the court to deny the motion under the doctrines of equitable estoppel and public policy, "a court is not free to alter [an unambiguous] contract to reflect its personal notions of fairness and equity." SIGNIFICANCE OF THE CASE: The court sympathizes with plaintiff's position; nevertheless, plaintiff fails to rebut defendants' prima facie case by raising a question of material fact requiring a trial. It is for this reason that summary judgment is granted and the case is dismissed. CRITICAL THINKING This case truly demonstrates the long-lasting effects of the horror of the holocaust. As late as 2018, the long shadow of Nazism still casts a pall on society. Do you agree with the court's rationale. Is the court too "technical" in its interpretation of the release contract. Should the court have considered the doctrine of unconscionability? ETHICAL DECISION MAKING Does this case create any emotional feelings in you? Is this just a case in commercial transaction? Is this yet another case where parties must be acutely aware of the language present in any contract? Page 345Page 346 Title Versus Other Interests in the Goods The determination of who has good title does not always result in the expected and equitable solution to a problem. For example, suppose you purchased a couch at a furniture store. It is pretty safe to say that once you identify the couch and pay for it, you have title to it. Now suppose that when the store attempts to deliver the couch to your home, lightning hits the store's delivery truck and destroys the couch. Is the store legally obligated to replace the couch? Most of us would intuitively answer that it is. After all, you never took possession of the couch. However, as previously noted, you have title. Under pre-UCC law, this loss could have fallen on whoever had title at that time—and that person would be you. Under the UCC, if the store is a merchant, the risk of loss remains with the seller until the couch is actually delivered to you. As a result of such dilemmas, the UCC breaks up the various issues traditionally correlated with

title and treats them separately. Several issues normally are thought of under the concept of title: Ownership: When does title actually transfer from the seller to the buyer, since the right to transfer ownership of the goods, whether through a subsequent sale or gift, is tied to title? Encumbrance: The right to encumber goods as collateral for a debt depends on who is holding title. When title passes is important because having title means that one can then sell or encumber the goods. In other words, having title means that one can pass title. Loss: In regard to the right to indemnification if the goods are damaged, when the risk of loss attaches is important. This is because, regardless of title passing, we need to know the seller's and buyer's responsibility to each other in the event that the goods are damaged or destroyed prior to the buyer taking complete possession of the goods. Insurable interest: An insurable interest is the right to insure the goods against any risk exposure such as damage or destruction. When an insurable interest is created in the goods is important. Both the buyer and the seller can insure themselves for potential loss in the event the goods are damaged or destroyed at some point in the transaction. A key point is identifying the earliest time in the transaction that the buyer can claim an insurable interest. The following Case Nugget addresses that issue. Page 347 CASE Nugget When Does Insurable Interest Arise? National Compressor Corp. v. Carrow and McGee Federal Circuit Court of Appeals 417 F.2d 97 (1969) National Compressor bought a large compressor from Davis, who had bought the compressor from Carrow and McGee. Title to the compressor was not to pass to National Compressor until the compressor was removed from Carrow and McGee's property. Prior to the compressor being moved (and title passing to National Compressor), a fire broke out at the site, destroying the compressor. National Compressor had already paid the $12,000 purchase price. The issue before the court was whether National Compressor had any kind of insurable interest since clearly title had not yet passed. The defendants claimed that National Compressor had no standing to bring the lawsuit because it had no interest in the property since title had yet to pass. The court ruled otherwise, stating that National Compressor had an insurable and special interest in the good, thus giving it standing to sue. The court ruled Where a third party so deals with goods which have been identified to a contract for sale as to cause actionable injury to a party to that contract (a) a right of action against the third party is in either party to the contract for sale who has title to or a security interest or a special property or an insurable interest in the goods; and if the goods have been destroyed or converted a right of action is also in the party who either bore the risk of loss under the contract for sale or has since the injury assumed that risk as against the

other. . . . The buyer obtains a special property and an insurable interest in goods by identification of existing goods as goods to which the contract refers, even though the goods so identified are nonconforming and he has an option to return or reject them. Such identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement, identification occurs (a) when the contract is made if it is for the sale of goods already existing and identified. One very important point to note is that the parties are always free to create a contract that lays out and defines such issues as when title passes and when risk of loss passes. The UCC's rules are essentially the default rules for contracts that do not clearly spell out such provisions. Let's look at each one of these issues within the context of the four kinds of sales contracts that Article 2 creates.

Types of Sales Contracts The UCC lays out essentially four broad factual scenarios for the sale of goods: Simple delivery contract: A simple delivery contract occurs when the purchased goods are transferred to the buyer from the seller at either the time of the sale or some time later by the seller's delivery. Common-carrier delivery contract: This type of contract occurs when the goods are delivered to the buyer by a common carrier, such as a trucking line. Goods-in-bailment contract: This type of contract occurs when the purchased goods are in some kind of storage under the control of a third party, such as a warehouseman. Conditional sales contract: A conditional sales contract occurs when the sale itself is contingent on approval, for example. Page 348 In the sections that follow, this chapter answers questions about ownership, encumbrance, loss, and insurable interest as they relate to these four types of sales contracts. Simple Delivery Contract With a simple delivery contract, the buyer and seller typically execute an agreement, and the buyer leaves with the goods. To most of us, it appears that title, risk of loss, and insurable interest all pass to the buyer at the moment the transaction is consummated and the buyer walks out with the goods. However, under the UCC, there are three distinct steps: (1) Title transfers to the buyer when the goods are identified to the contract, that is, when the contract is executed; (2) risk of loss transfers to the buyer when the buyer takes possession; and (3) insurable interest is created in the buyer when the goods are identified to the contract, in other words, at the same time that title passes. But what happens if the buyer comes back later to pick up the goods or arranges to have the seller, or an agent of the seller,

deliver the goods at a later time? For the purposes of title and insurable interest, nothing really changes. The dilemma occurs with risk of loss. Let’s suppose a buyer and seller execute a contract in which the seller will deliver a refrigerator later in the day to the buyer. Through no fault of the seller, the refrigerator is damaged in a fire at the seller’s store. Who has the risk of loss if neither party is at fault? In this case, the issue rests on the seller’s status. If the seller is a merchant, as in this instance, the risk of loss remains with the seller until the goods are actually delivered to the buyer. If the seller is not a merchant, the risk of loss remains with the buyer under the rule of tender of delivery. Simply put, tender of delivery is the moment the goods were available for the buyer to take. Consider this example: You purchase a dresser at a garage sale, but you want to go home and get your truck so that you can get it home easily. Unfortunately, a car hits the dresser and destroys it. You, the buyer, cannot get your money back because (1) the law does not consider the seller a merchant and (2) you could have taken the dresser with you when you bought it. Note that the results are different if either party is at fault for the damage. In that case, the responsible person is liable under tort law for the damage caused. With a simple delivery contract whereby a seller transfers goods to a buyer without the middle-delivery common carrier, the various interests transfer as the following shows. (Note: Even if the seller has its agent deliver the goods to the buyer, this is still a simple delivery.) Simple delivery: seller → buyer Title transfers on identification of the goods to the contract. If the seller is a merchant, risk of loss transfers on delivery of the goods to the buyer; if the seller is not a merchant, risk of loss transfers when the goods are made available for the buyer to possess (tender of delivery). The parties may buy insurance on their goods if they hold title or have any risk of loss or other economic interest. Common-Carrier Delivery Contract LO 15-7 Explain risk of loss. If a buyer and seller execute a contract and the seller subsequently places the goods with a common carrier for delivery to the buyer, the parties have executed a common-carrier delivery contract. Note that a common carrier is an independent contractor and not an agent of the seller. What makes the common carrier an independent contractor, rather than an agent, is that the carrier controls the primary aspects of performance, such as how the goods are actually delivered. The UCC names two kinds of delivery contracts in this category: origin, or shipment, contracts and destination contracts. Shipment contracts require the seller to ship the goods to the buyer by a common carrier. The seller is required to make proper shipping arrangements and deliver the goods into the common carrier’s hands. Title passes to the buyer at the time and place of shipment. Thus, the buyer bears the risk of loss while the goods are in transit.

Destination contracts require the seller to deliver the goods to the destination stipulated in the sales contract. This may be the buyer’s place of business or some other location. The seller bears the risk of loss until that time. Exhibit 15-6 identifies shipping terms that create the conditions of transit and delivery. Page 349 Exhibit 15-6Shipping Terms Specifying Requirements for Delivery TERM EXPLANATION FOB (free on board) The selling price includes transportation costs, and the seller carries the risk of loss to either the place of shipment or the place of destination. FAS (free alongside) The seller, at seller’s expense, delivers the goods alongside the ship before the risk passes to the buyer. CIF or C&F (cost, insurance, and freight; cost and freight) The seller puts the goods in possession of a carrier before the risk passes to the buyer. Contracts are usually shipment contracts rather than destination contracts. Delivery ex-ship (delivery from the carrying vessel) Risk of loss passes to the buyer when the goods leave the ship. With a shipment contract, whereby a seller transfers goods to a buyer with delivery of the goods effected by a common carrier, the various interests transfer as follows: Shipment contract: seller → common carrier → buyer If the shipment contract is an origin contract (if the contract is vague or ambiguous, an origin contract will be presumed), the title passes to the buyer when the goods are turned over by the seller to the common carrier. If the shipment contract is a destination contract, the title transfers from the seller to the buyer when the common carrier delivers the goods to the buyer. The risk of loss in either situation—origin or destination contract—transfers from the seller to the buyer simultaneously with the title. An insurable interest is created when the buyer and/or seller holds title or retains a risk of loss. Goods-in-Bailment Contract A goods-in-bailment contract involves goods that are in some kind of storage (e.g., in a warehouse or on board a ship), so the seller cannot transfer physical possession of them. Instead, the seller has one of three documents indicating ownership of the goods: a negotiable document of title, a nonnegotiable document of title, or a contract or other instrument showing ownership that is not a negotiable or nonnegotiable document of title. If the seller has a negotiable document (i.e., a document containing the words “deliver to the order of [seller]”), then both title and risk of loss transfer from the seller to the buyer as soon as that negotiable instrument is endorsed over to the buyer. On the other hand, if the document is nonnegotiable (i.e., a document lacking the words “to the order of”), then the title passes with the instrument of title, but the risk of loss does not pass to the buyer until the bailee (the custodian of the goods) is notified of the transfer or a reasonable time has elapsed since the transaction. Finally, if there is neither a negotiable or a non-negotiable

document of title, then the title passes at the time the sales contract is executed, but the risk does not pass to the buyer until the bailee is notified of the transaction and acknowledges such notification. With goods in bailment, the three interests—title, risk of loss, insurable interest—pass in the following way: Seller → buyer, but the goods are elsewhere in some kind of storage and in a third party's possession and care. Page 350 Title passes from the seller to the buyer when the document of title (e.g., a warehouse receipt or a bill of lading) is actually endorsed or signed over to the buyer. If there is no document of title, then title passes when the goods are identified to the contract and the contract is executed. Risk of loss passes to the buyer simultaneously with the document of title, provided that the document of title is a negotiable one. If it is nonnegotiable, the risk does not pass until the bailee (the possessor or custodian of the goods) is notified or a reasonable time elapses. If there is no document of title, risk passes to the buyer on notification and acknowledgment by the bailee. Insurable interest is created when either party has title, risk of loss, or some other economic interest attached to the goods (e.g., a creditor who secures a loan by taking the goods as collateral). Conditional Sales Contract Conditional sales contracts are either sale-on-approval contracts or sale-or-return contracts. A contract is a sale-on-approval contract if the seller allows the buyer to take possession of the goods before deciding whether to complete the contract by making the purchase. Title and risk of loss remain with the seller until the buyer notifies the seller about the approval of the contract. A sale-or-return contract occurs when the seller and buyer agree that the buyer may return the goods at a later time. Such contracts usually occur when the buyer is buying inventory to resell. For example, suppose the seller is a dress wholesaler and the buyer is a retailer who is purchasing the dresses to sell in her store. In their sale-or-return agreement, the insurable interest is created in the buyer once the goods are identified in the contract. Title and risk of loss depend on whether the goods are in bailment, delivered by common carrier, or delivered by the seller himself. Without an agreement to the contrary, if the buyer subsequently returns the dresses, she does so at her own expense and risk.

Risk of Loss during a Breach of Contract When the Seller is in Breach The failure to deliver goods is the most common way a sales contract is breached. If the seller does not provide the goods that were described in the contract, the buyer may either (1) accept the nonconforming goods as-is or (2) reject the goods subject to the seller curing the deficiency in the goods.

The buyer may reject the goods if no cure is possible or the seller fails to cure the deficiency within a reasonable time. In all these instances, the risk of loss remains with the seller until either the buyer accepts the goods or the seller cures the deficiency and provides the buyer with conforming goods. If a cure is not possible or if the seller has failed to cure the deficiency within a reasonable time, the buyer has the option to revoke the contract. (The remedies are discussed in subsequent chapters.) However, the UCC creates a disincentive for buyers who do so: If the risk of loss would have transferred to the buyer had there not been a breach, the risk transfers to the buyer to the extent of any insurance the buyer has. The loss reverts to the breaching seller only to the extent that the buyer's insurance does not cover it. Consider the following Case Nugget regarding a seller who is accused of being in breach in breach. CASE Nugget Anyone for a Bar-B-Que? Chicago Prime Packers, Inc. v. Northam Food Trading Co., United States Court of Appeals for the Seventh Circuit 408 F.3d 894 (2005) Chicago Prime Packers Inc. is a meat wholesaler. Northam Food Trading Co. is a Canadian partnership that distributes meats to retailers and restaurants. Northam entered into a contract for the purchase of 40,500 pounds of pork back ribs for a purchase price of $178,200. Chicago Prime had title to the ribs, having purchased them from Brookfield Farms. Brookfield Farms held those ribs in B&B Cold Storage. So, we have a classic case of a contract for the sale of goods with shipment to take place upon the execution of the sales contract between Chicago Prime and Northam. When Chicago Prime and Northam inked the contract, Brown Brother's Trucking Company picked up the frozen ribs with its freezer trucks and delivered the ribs to Northam. Northam discovered that the ribs were in an "off condition" and rejected the ribs as nonconforming. The USDA inspector found them to be spoiled and inedible. Northam refused to pay the purchase price, and Chicago Prime sued. Chicago Prime claimed that when the frozen ribs were put into Brown Brother's possession, the risk of loss transferred to Northam and that Northam owes the purchase price to Chicago Prime. Northam refuses to pay. Do title passing and risk of loss passing occur at different times? Since the buyers could not show any negligence on the part of Chicago Prime, title and risk of loss passed to Northram upon transfer from Chicago Prime to Brown's Trucking. Northram has both title and risk now. The key is that the seller was actually not in breach, though Northram argued that the seller was but cold not prove it. Could Brown Brother's Trucking be at fault here? Absolutely! Both Chicago Prime and Northram are non-breaching parties. The fault seems to lie with the shipper. Northram is ordered to pay Chicago Prime the purchase price plus interest. Page 351 When the Buyer Is in Breach Most

buyer breaches occur when a buyer refuses to accept conforming goods from the seller and then the goods are subsequently lost or damaged. With an origin or shipment contract, the risk would have already transferred to the breaching buyer. However, if the contract is a destination contract, the risk remains with the seller. To encourage sellers to create origin contracts, the UCC requires the risk of loss to remain with the seller to the extent of the seller's insurance. If the seller does not have insurance or the loss exceeds the seller's insurance, the remainder transfers to the breaching buyer. CASE OPENER WRAP-UP "I'll huff and I'll puff and I'll blow your house down." Let's look at the questions posed with the mobile home. Is the sale of mobile home which is to be affixed to the ground a sale of a good under UCC Article 2? Or is it realty? The court found that this is a sale of a good under the Uniform Commercial Code Article 2. The mobile home is clearly moveable and tangible despite eventually being affixed to the ground. But there is another issue here. Is this a mixed contract for a good, the mobile home, and services, the setup procedure. It is a mixed contract, but the overwhelming value of the contract is the purchase price for the good, to whatever cost may be associated with the mobile home. Had the mobile home been accepted by the buyers by moving personal items into the home and by cleaning it? Does that determination shift the risk of loss? If, and this is a big if, the buyers had accepted the mobile home, then the risk of loss would have shifted to the buyers. But it was determined that (1) since the setup had not been completed by the seller, (2) that the family had not physically moved in, (3) that the moving of kitchen items and cleaning the home was not determinative to "acceptance," and (4) that the spouse had discovered items needing repair before possession could occur, then no acceptance by the buyers had occurred. Has there been no acceptance yet since the setup had not been completed? This was the factually determining factor in finding that no acceptance had occurred. Who is responsible for the economic loss of the home due to the windstorm? Even though title may have passed to the buyers with the purchase of the mobile home, likely with the identification of the mobile home to the contract, risk of loss would not have passed until actually delivery and acceptance. When the seller is a merchant, as in this case, and the buyer is not, then risk of loss does not pass until delivery and acceptance by the buyer. Delivery would have occurred when the setup had been fully satisfied and any nonconforming issues with the home had been resolved. Therefore, they buyer is awarded the return of any and all purchase price from the seller. Page 352 PRACTICAL TIPS for Business Managers Save yourself potential headaches by making clear when negotiating any contract as to whether you are interpreting the transaction as being governed by the

Uniform Commercial Code. Also, make sure that the other party understands this! Plus, put that expectation into the contract, i.e. “The parties agree that this agreement is governed by Article 2 or 2(a) of the Uniform Commercial Code.” Language is very, very important. Even when a mistake is made is complete good faith, language come back and bite you if you are not very careful. One of the reasons to have experienced attorneys review all legal documents, managers need to develop a habit to closely read what representations are made on any document. Speaking of language, parties are free to draft the language in any contract. The UCC provides the “gap” meaning or assumptions when contracts are silent. For example, the parties are free to determine when title actually passes. If the contract is silent, then the UCC fills in the “gap.”

SUMMARY The Uniform Commercial Code Scope of the UCC: The UCC is a uniform or model law that governs commercial transactions, from the sale of goods to secured transactions. Significance of the UCC: The UCC adds clarity and predictability to sales law. Articles 2 and 2(A) of the UCC Article 2 (Sales) covers contracts for the sale of goods. Sale: The passing of title from the seller to the buyer for a price. Goods: Tangible things that can be moved. Mixed goods and services contracts: Contracts that include both goods and services. Courts apply Article 2 if the goods are the predominant part of the transaction. Merchants: Buyers or sellers who (1) deal in goods of the kind, (2) by occupation, hold themselves out as having knowledge and skill unique to the practices or goods involved in the transaction, or (3) employ a merchant as a broker, agent, or other intermediary. Various provisions of the UCC distinguish merchants from ordinary buyers and sellers. Article 2(A) (Leases) covers contracts for the lease of goods. Leases: Transfers of the right to possession and use of goods for a term in return for consideration. Special kinds of leases: Consumer leases and finance leases. The UCC outlines special rules and protections for each kind of lease. Contracts for the International Sale of Goods Scope of the CISG: The CISG is a treaty countries can sign to govern international business-to-business sales contracts. Many major trading nations have signed the CISG. Significance of the CISG: The CISG is important because it, rather than the UCC, governs international sales contracts. The CISG provides clarity, predictability, and uniformity for businesses that operate in the global economy. How Sales and Lease Contracts Are Formed under the UCC Formation in general: The UCC is more lenient than common law regarding contract formation. Courts look at the intent of the parties to a sales or lease contract. Offer and acceptance: Offers

are valid even if terms are left open. The common law mirror-image rule does not apply to contracts for the sale or lease of goods. Courts look on a case-by-case basis to determine whether to allow additional terms. Consideration: When sales and lease contracts are modified, these modifications do not need to be supported by new consideration. Battle of the forms: The last form in either the offer or acceptance that a party sends to the other is presumed to control the final terms of the contract unless specifically objected to by the receiving party. Statute of frauds: Contracts for the sale of goods must be in writing if the goods are priced at $500 or more. Lease contracts that require payments of $1,000 or more must be in writing. Exceptions exist for: Specifically manufactured goods. Contracts that parties admit exist. Situations in which partial performance has occurred. Unconscionability: Under the UCC, a court can refuse to enforce the parts of a contract or lease that are unfair or one-sided. Title There are three kinds of title: good title, void title, and voidable title. Good title is title that is acquired from someone who already owns the goods free and clear. Void title is not true title. Someone who purchases stolen goods has void title. Voidable title occurs in certain situations in which the contract between the original parties would be void but the goods have already been sold to a third party. Acquiring Good Title Article 2 of the Uniform Commercial Code covers issues related to acquiring good title. The most obvious way to attain good title is to acquire it from someone who has good title. Someone who has come into possession of stolen goods never has title and can pass only void title. A buyer gets voidable title if he or she has deceived the seller regarding his or her true identity, written a bad check for the goods, committed criminal fraud in securing the goods, or is a minor, or if the buyer and seller agreed that title would not pass until some later time. Third-party purchasers generally get good title. If an owner entrusts the possession of goods to a merchant who deals in goods of that kind, the merchant can transfer all rights in the goods to a buyer in the ordinary course of business. The UCC provides recourse for situations in which good title may not be enough for an equitable result. The UCC responds to issues related to the following: Ownership refers to transfer of title. Encumbrance refers to when goods may be used as collateral for a debt. Loss refers to who has the risk of loss, which matters when someone is seeking indemnification for damaged goods. Insurable interest refers to the right to insure goods against any risk exposure. Types of Sales Contracts A simple delivery contract occurs when the seller transfers the title to the buyer upon identification of the goods and the transfer of the actual good is directly from seller to buyer. A common-carrier delivery contract exists when a buyer and seller execute a contract

and the seller subsequently places the goods with a common carrier. There are two types of common-carrier delivery contracts: origin, or shipment, contracts and destination contracts. In shipment contracts, title transfers to the buyer at the time and place of shipment. The buyer bears the risk of loss while the goods are in transit. In destination contracts, the seller bears the risk of loss until the seller delivers the goods to the destination stipulated in the sales contract. A goods-in-bailment contract is one that identifies goods that are in some kind of storage. Rules regarding passage of title, risk of loss, and insurable interest vary depending on whether the seller has a negotiable document of title, a nonnegotiable document of title, or a contract showing ownership that is neither a negotiable nor nonnegotiable document of title. A conditional sales contract includes sale-on-approval or sale-or-return contracts. In a sale-on-approval contract, title and risk of loss remain with the seller until the buyer notifies the seller about the approval of the contract. In a sale-or-return contract, the insurable interest is created in the buyer once the goods are identified in the contract. Title and risk of loss depend on whether the goods are in bailment, delivered by common carrier, or delivered by the seller. Risk of Loss during a Breach of Contract When the seller is in breach by failing to deliver goods, the buyer may either accept the nonconforming goods as-is or reject the goods subject to the seller curing the deficiencies in the goods. Risk of loss remains with the seller until the buyer accepts the goods or the deficiencies are corrected. When the buyer is in breach because he or she has refused to accept conforming goods and then the goods are subsequently lost or damaged, who bears the risk of loss depends on the type of contract that exists between the buyer and the seller.

Point/Counterpoint Should the UCC be Expanded to Include the Sale of Realty and Services? YES NO The Uniform Commercial Code was created to facilitate commercial activity especially in areas of contract law where the common law had created cumbersome and counterproductive obstacles. A good case in point is the relaxing of specificity in material terms in the offer and acceptance. Price can be decided at a future date, for example. This provides flexibility in contract negotiation and formation. Clearly such flexibility would be welcome in contracts for the purchasing of real estate and for services. Such flexibility permits greater freedom of contract and allows parties to be more imaginative and creative in contract formation. Moreover, the UCC terms permit parties to be fluid in their own businesses

and transactions. Moving to a UCC approach to realty and service contracts is actually a pro-business strategy with no downside. That is an aspect which is always beneficial to the market and society. It is true that true UCC provides greater flexibility for contract formation and creation. But it applies only to the buying and selling of goods and not to realty and services. More significantly, it generally only to merchant-to-merchant transactions. Nonmerchants, primarily consumers, are not equipped with the market savvy and wherewithal that merchants have, or at least should have. Take the battle of the forms. Would a consumer understand and appreciate that the last offer made by a seller is automatically accepted unless objected to? That rule alone puts an unreasonable burden on a non-merchant consumer. Common law rules of contract formation evolved out of genuine needs to contract integrity. They did not evolve in order to make contract formation difficult or cumbersome. Most contracts for the buying and selling of goods takes place in merchant-to-merchants transactions. As such, the strict rules of common law contract formation and interpretation can be relaxed a bit in order to create greater market flexibility. But the sales of services and realty are more often between nonmerchants or merchants with nonmerchants. The inherent protections which common law affords contract formation should be retained and not relaxed in favor of the UCC.

Questions & Problems Explain what determines whether a contract is covered by the UCC. Under common law, most property issues can be settled by who has a good title. Explain why such traditional characteristics of property ownership, such as transfer, risk of loss, insurable interest, and right to encumber are “broken up” and subject to varying tests under the UCC. A contract is created to refurbish a luxury yacht: new color schemes, new furniture: new wall and floor coverings, new light fixtures and window treatments—the whole works. Of course, it is not just the purchase of new items but also the installation and the creation of a redecorating plan. A dispute arises under the contract. Is the contract to be interpreted under the UCC for the sale of goods or under common law as a service contract? The “predominancy” test must be applied: is the contract predominantly for the buying of goods or predominantly for the service of installation and redecorating. In this particular case, see Golisano v. Vitoch Interiors Ltd., 150 A.D.3d 1629; 54 N.Y.S.3d 244 (2017) The defendant contracted with the plaintiff to design, maintain, and develop software and to host the defendant’s web page. After a falling out, the defendant moved its web page to another site and refused to honor its contract with the plaintiff. The

plaintiff sued. Did the contract fall under the UCC? Were the items—software, web hosting, website maintenance—goods under the UCC? Source: Dennis Conwell and Frank Splittorff, D/B/A Piece of America, Appellant, v. Gray Loon Outdoor Marketing Group, Inc., Appellee, No. 82S04-0806-CV-00309, Sup. Ct. Ind., 906 N.E.2d 805; 2009 Ind. LEXIS 465; 69 U.C.C. Rep. Serv. 2d (Callaghan) 71 (2009). A foreclosure case saw creditors going after the business's real estate. The business was a diner, however, the diner itself was a prefabricated building. The business owner claimed that the building itself was not realty and subject to the creditors' claims but was, instead, a trade fixture. Please discuss. Source: J.K.S.P Restaurant v. County of Nassau, 513 N.Y.S.2nd 716 (N.Y. App. Div. 1987). A company contracts with a marketing firm to construct software and create a business website. A quote is requested and accepted. Sometime later, the business asks for updates and revisions but fails to request a quote. The business subsequently refuses to pay for the changes, claiming no contract was formed under the requirements of the offer under the UCC. The marketing firm then took the website down for nonpayment. The marketing firm then sued for nonpayment of its invoice; the company countersues on the tort of conversion for the loss of the website. This intriguing case offers up several questions, the first being whether this dispute even falls under UCC subject matter? Does it? The second is whether the claim of conversion will lie. Will it? [Dennis Conwell et al. v. Gray Look Outdoor Marketing Group, Inc., 906 N.E.2d 805; 2009 Ind. LEXIS 465; 69 U.C.C. Rep. Serv. 2d (Callaghan) 71 (Ind. Sup. Ct. 2009).] This appeal arises from a dispute between a law firm, respondent Freidberg & Parker, LLP (Freidberg), and a company that provides technical electronic services, appellant Digital Document Technologies, LLC (DDT). It is undisputed that Freidberg asked DDT to process electronic media for use in litigation, and that Freidberg had asked DDT to do other work before. This time, DDT's emails with Freidberg at least arguably suggested the work would result in a modest charge, but when the work was done, DDT charged over $50,000. After a court trial involving expert testimony as to the reasonable value of DDT's services, the trial court awarded DDT just over $8,000, but denied interest or attorney fees. On appeal, DDT faults the trial court for not finding that Freidberg was a "merchant" under the Uniform Commercial Code (UCC), and not understanding that DDT's pleading embraced a UCC contract claim, which, if sustained, would have entitled DDT to an award of attorney fees, costs, and interest. For this transaction, is the law firm a merchant? Source: Digital Documents Tech v. Friedman & Parker. 2015 Cal App unpublished Lexis 8225 (2015). A manufacturer based in Argentina and an importer based in New Jersey entered into an oral

agreement under which the importer agreed to sell the manufacturer’s products in the United States. The district court found that the manufacturer’s claim that the importer had failed to pay the full amount due was barred by the United Nations Convention on Contracts for the International Sale of Goods (CISG) because the agreement was not in writing. Although the CISG eliminated formal writing requirements for contracts, Argentina had made a declaration opting out of that provision. However, the United States had not made such a declaration. The court of appeals held that it was necessary to consider New Jersey choice-of-law rules to determine whether New Jersey or Argentine form requirements governed the manufacturer’s claim. Does the contract need documentation to be enforceable, or, if U.S. law applies with the adoption of the CISG, are the oral declarations satisfactory? Source: Forestal Guarani S.A., Appellant, v. Daros International, Inc., No. 08-4488, 3d Cir. Ct. of Appeals, 614 F.3d 395; 2010 U.S. App. LEXIS 14969. Page 356 In a contract dispute between a U.S. company and a Canadian company, the contract itself referred to provisions of the Uniform Commercial Code. Do these references alone preempt the contract from being governed by the CISG? This is important because the contract had never been reduced to writing, thus negating its enforceable under the UCC but not under the CISG. What do you think? See Travelers v. Saint-Gobain, 474 F. Supp.2d 1075 (2007) SMG was a frozen-poultry wholesaler, and Sanderson was one the suppliers. SMG contracted to sell 24 containers of frozen poultry to KVADRO, a Russian company. The shipping terms were CIF, cost insurance and freight. In connection with the business, SMG carried a one-year open cargo insurance policy from Lloyd’s. SMG arranged for shipment to Russia through PO Nedlloyd. In April, the Russian government suspended all previously issued permits for the import of poultry into Russia from the United States. Due to this and the change of city it was to be shipped to, the shipment violated the 60-day rule and was subsequently seized. The investigation was ended and the shipment released, but before it was picked up, it was seized again, and SMG never received payment. SMG then filed a claim against the insurance policy with Lloyd’s, which was rejected. Nedlloyd and SMG then sued either seeking freight charges and damages, respectively. Nedlloyd subsequently added Lloyd’s to the suit, claiming to be a third-party beneficiary. Lloyd’s moved for summary judgment because Nedlloyd was not an intended third party, SMG had no insurable interest at the time, and the Lloyd’s policy did not cover credit risk and seizure by customers and thus was excluded for the contract. A summary judgment was issued by the district court, claiming no insurable interest and Nedlloyd not as an intended beneficiary. SMG appealed the

ruling. Does SMG have an insurable interest? Source: Nedlloyd v. Sanderson Farms, Inc., 2006 U.S. App. LEXIS 22227 (2006). Marilyn Thomas purchased an installed pool heater from Sunkissed. The pool heater was delivered to Marilyn's residence, but the delivery slip was signed by Nancy Thomas. Marilyn did not know of anyone by that name. She called Sunkissed to advise the company to move the heater. The neighborhood was not safe, and she was worried that the heater would be taken. The heater remained in her driveway for approximately four days. When Marilyn noticed that the heater was no longer in her driveway, she again contacted Sunkissed, but she was told not to worry. Who was responsible for the loss of the heater? Did Sunkissed actually deliver the heater to Marilyn? How do you think the court decided? Source: In re Marilyn Thomas, 182 B.R. 347 (1995). New furniture is delivered to the buyer, and it is badly damaged. The purchaser notified the furniture store of the damage, and the store sent a representative to the buyer. The representative explained that the furniture could be repaired and restored. After hearing the details, the buyer refused and asked for her money back. The store refused, claiming that she had accepted the goods and was required to permit the seller to cure the defects. Who prevails? Source: Clark v. Zaid, Inc., 263 Md. 127 (1971). The buyer contracted with the seller for a customized machine. The seller filed to have the machine ready by the agreed-upon deadline. Twice the buyer agreed to an extension, neither of which was met by the seller. The seller then terminated the contract. The buyer sued for breach claiming that it had not been given sufficient time to effect a cure. Who prevails? Source: Star Machine, Inc. v. Ford Motor Co., United States Court of Appeals for the Sixth Circuit, 1998 U.S. App. LEXIS 15392 (1998). Treibacher, an Austrian vendor of hard-metal powders, agreed to two contracts with the defendant TDY to sell specified quantities of tantalum carbide (TaC), a hard-metal powder, to TDY Industries Inc., for delivery to consignment. TDY planned to use the TaC in manufacturing tungsten-graded carbide powders at its plant in Gurney, Alabama. After it had received some of the amount of TaC specified in the November 2000 contract, TDY refused to take delivery of the balance of the TaC specified in both contracts and, in a letter to Treibacher dated August 23, 2001, denied that it had a binding obligation to take delivery of or pay for any TaC that it did not want to use. Unbeknownst to Treibacher, TDY had purchased the TaC it needed from another vendor at lower prices than those specified in its contracts with Treibacher. Treibacher eventually sold the quantities of TaC that TDY had refused to take delivery of, but at lower prices than those specified in its contracts with TDY. Treibacher then filed suit against TDY, seeking to recover the balance of the amount Treibacher would

have received if TDY had paid for all of the TaC specified in the November and December 2000 contracts. What is the appropriate remedy here for Treibacher if TDY is in breach? Does this case fall under the CISG or the UCC? Is there any significance to applying the CISG rather than the UCC? Source: Treibacher Industrie, A.G., Plaintiff-Appellee, v. Allegheny Technologies, Inc., a Pennsylvania Corporation et al., Defendants, TDY Industries, Inc., Defendant-Appellant, 464 F.3d 1235 (11th Cir. 2006); 2006 U.S. App. LEXIS 23252; 19 Fla. L. Weekly Fed. C 1046 (2006). Page 357 The defendant, Nwabuoku, purchased $1,500 worth of furniture from the plaintiff, Y&N Furniture. Through an arrangement with the plaintiff, the defendant financed the purchase through a financing company named Beneficial. On receipt of the furniture, the defendant was to notify Beneficial that receipt was effected, and Beneficial would pay Y&N the $1,500 purchase price. Nwabuoku would then begin paying Beneficial the amount due plus interest, according to their financing agreement. Nwabuoku refused to acknowledge receipt to Beneficial and eventually rejected the goods, claiming that he did not want the furniture. Is this rejection enforceable? Source: Y & N Furniture Inc. v. Nwabuoku, 734 N.Y.S.2d 392 (2001). The plaintiff and the defendant entered into a three-year contract in which the defendant would be the sole supplier of steel parts that the plaintiff used in its products. A dispute arose after the defendant sought to surcharge the parts sold to reflect increased costs. The plaintiff filed a lawsuit for breach of contract, and the jury returned a verdict in favor of the defendant, finding on a special verdict that there had been a valid modification to the contract, based solely on emails between the parties. Is this evidence enough to support a reformation of the contract? Source: Copeland Corporation, Plaintiff-Appellant, v. Choice Fabricators Incorporated, Defendant-Appellee, No. 08-3194, 6th Cir. Ct. of Appeals, 09a0622n.06; 345 Fed. Appx. 74; 2009 U.S. App. LEXIS 19986; 2009 FED App. 0622N (6th Cir.); 69 U.C.C. Rep. Serv. 2d (Callaghan) 802.